Office of Command Counsel Newsletter

February 2001, Volume 2001-1

CLE 2001

The CLE Planning Committee held its first couple of meetings to discuss and design the plenary sessions, elective topics, the enrichment session and possible conference activities. **Steve Klatsky** is the chair of the committee. Members are **Vera Meza**, **Cassandra Johnson**, **Ed Stolarun**, **Bob Lingo**, **Mike Lassman** and **Mike Wentink**. CLE 2001 is 21-25 May at the Grosvenor Hotel, Lake Buena Vista, Florida.

We thank you for the solid and thoughtful suggestions and topics that you submitted—all will be seriously considered by the Committee. We have a variety of topics in all of the legal disciplines we practice that will make for an interesting and educational experience.

In the next few weeks you may be called upon to participate as speakers on these topics, or to contribute to the Legal Focus sessions that will be conducted. There are four Legal Focus Sessions: Acquisition, Environmental, Employment and Intellectual Property.

We hope you share the belief that active participation with your colleagues makes for a successful CLE Program.

If you have any further ideas or thoughts on the contents of the programs, or any other CLE-related question please contact **Steve Klatsky** DSN767-2304. sklatsky@hqamc.army.mil.

In This Issue:

TEDDY ROOSEVELT: On America...in 1901

"We belong to a young nation, already of giant strength, yet whose present strength is but a forecast of the power that is to come. We stand supreme in the continent, in the hemisphere. East and west we look across the two great oceans toward the larger world-life in which, whether we will or not, we must take an ever-increasing share. As, keen-eyed, we gaze into the coming years, duties new and old rise thick and fast to confront us from within and without."

***Theodore Roosevelt** on the American spirit in 1901*

Verbon Black Dies

Retired MICOM Chief Counsel

W. Verbon Black, 69, former Chief Counsel at the U.S. Army Missile Command (MICOM--predecessor of AMCOM) died Sunday December 31, 2000 in Huntsville, Alabama.

Mr. Black graduated from Birmingham Southern College and the University of Alabama Law School and received a master's degree in public administration from the Harvard University School of Public Administration.

He was a Korean War veteran and practiced law in Birmingham before becoming chief counsel to the Army Missile Command in Huntsville.

Recognized with the Presidential Award in the Senior Executive Service in 1994, Mr. Black was also named Attorney of the Year by the Army Materiel Command in 1986.

He was an active supporter of the Huntsville Museum of Art,WLRH Public Radio, the Alabama Public Television Network and the Huntsville Literary Association and was a member of the board of directors of the Historic Huntsville Foundation.

Survivors include his wife, Delia Wells Black of Huntsville; two brothers, Lehmon Ray Black of Arab and John Hugh Black of Huntsville; two sisters, Linda Lou Black Glenn and Glenda Sue Black Ponder, both of Arab; and several nieces and nephews.

Memorials may be made to the American Heart Association, WLRH Public Radio or the Huntsville-Madison County Public Library.

Newsletter Details

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Check out the Newsletter on the Web at http://www.amc.army.mil/amc/command_counsel/

Letters to the Editor are accepted. Length must be no longer than 250 words. All submissions may be edited for clarity.

Acquisition Law Focus

The Economy Act

SBCCOM Chief Counsel **Pat Sheldon**, DSN 256-3724 provides an excellent article on The Economy Act (Encl 1).

The Economy Act provides agencies the authority we use to provide services to or secure the services of another Executive agency for in house performance or performance by contract where there is no other statutory authority

The Act had it genesis during the great depression. Congress was looking for ways to curtail the expenses of government.

It passed the Economy Act in 1932 to obtain economies by deleting duplicating and overlapping activities.

Interestingly the legislative history reflects Congress belief that private industry should not be called upon to perform "what Government Agencies can do more cheaply for each other," and that Government Agencies "especially equipped to perform the work" should be available whenever work can be performed "as expeditiously and for less money" than elsewhere.

Some DOD agencies abused their authority under the Act in the early nineties by offloading to circumvent funding restrictions or limitations. Agencies became unwitting partners in violations of the Antideficiency Act. This practice was called to a halt by a directive signed by the Secretary of Defense. Now we have extensive regulation of our use of the Economy Act.

The paper provides an overview of the applicable FAR regulations and describes the requirements for Determination & Findings.

Last, it addresses The Economy Act Order, the document you send or receive that initiates the transaction. It is a written agreement between the requiring and servicing agencies. The elements of that agreement required by the FAR are:

a. a description of the supplies or services required;

b. delivery requirements;

c. a funds citation;

d. a payment provision;

e. appropriate acquisition authority; and

f. a dispute resolution provision

List of Enclosures

1. The Economy Act
2. Technology Transfer Commercialization Act
3. Explaining Proprietary Technical Data
4. Distribution Statements on Technical Data
5. Financing Base Operations & Support Functions
6. Weingarten Rule Explained
7. Mandatory Removal: Law Enforcement Personnel
8. Selling & Privatizing Military Utility Systems
9. EO: Protection for Migratory Birds
10. Going After Polluters on Army Lands
11. DA Travel Policy-- Spouse Travel Approval
12. Telemarketing Scams
13. No Workplace Solicitation

Contains Official Use Only Information

Acquisition Law Focus

YEAR 2000 FAIR ACT LISTS AVAILABLE

The Year 2000 FAIR Act Commercial Activities Inventories are available for the public's review, the Office of Management and Budget has announced. Inventories from nearly 40 departments and agencies can now be viewed, including those from the Departments of Agriculture, Commerce, and Education. Under the FAIR Act, agencies are required to submit to OMB a list of commercial activities that are not "inherently governmental," are currently being performed by federal employees, and could be contracted out to the private sector. Click on http://www.whitehouse.gov/OMB/procurement/fair2agencycontact.html to access the most recent list of inventories.

AGENCIES MUST PAY INTEREST ON LATE PAYMENTS

Under an interim rule recently released by the Office of Management and Budget, federal agencies will have to pay service contractors interest if they fail to make a payment to the contractor within 30 days of receiving a proper invoice. The rule went into effect on December 15, 2000, and applies to payment requests received under cost-reimbursement service contracts awarded on or after December 15th. The new rule was issued to implement Section 1010 of the National Defense Authorization Act for FY 2001, which requires agencies to pay an interest penalty whenever they fail to make a timely payment on a service contract. Comments on the interim rule must be submitted by February 13, 2001.

New Tech Transfer Statute

Congress recently passed the Technology Transfer Commercialization Act of 2000. The Act's goals are to make the technology transfer process more "industry-friendly", as well as to simplify technology licensing.

Among other things, the Act permits licensing certain pre-existing patents related to Cooperative Research and Development Agreements ("CRADAs").

While this has always been permitted, it was sometimes procedurally difficult because the license and CRADA were in two separate agreements. POC is HQ AMC Counsel, **Lisa Simon**, DSN 767-2552 (Encl 2).

Counsel Newsletter

Acquisition Law Focus

Explaining Proprietary Technical Data

TACOM-ARDEC Intellectual property Team Leader **John Moran**, DSN 880-6590, provides a preventive law item written for clients, explaining for them the term proprietary technical data (Encl 3).

Initially it should be understood that proprietary data is not limited to data as usually used in our parlance of government terminology. Generally speaking, it is any information developed and possessed by one party that provides a competitive advantage over others. So it can take on various different forms. Outside the government, it is often just referred to as proprietary information. Some examples would be a list of customers that are specific to a company or a specific product/market. Usually this information was compiled by a study involving an investment or the expenditure of some effort or other resources resulting in specialized and valuable information creating an ownership stake. Such information must not be in the public domain so that it is not generally known. When such information is owned or developed by corporations, they may refer to it as a trade secret. It could take the form of technical or test data, specifications (TDPs),or other types of design information but it would not be limited to any of these as long as it complies with the general characteristics of not being known by others and having some value that provides a competitive advantage.

The paper describes the procedures applicable for maintaining the proprietary status of the information.

Additionally, it cautions employees regarding our obligation to safeguard such information, especially in an era when we are working more closely with contractor personnel.

DOJ Guidance on Electronic Processes

Legal Considerations in Designing and Implementing Electronic Processes:

From DOJ's web page: "This guide addresses legal issues that agencies are likely to face in converting to electronic processes and provides suggestions on how to address these issues. The rise of electronic commerce offers departments and agencies exciting opportunities to convert or redesign existing processes. At the same time, creating a more accessible and efficient government reqires us to maintain public confidence in the security and reliability of the Government?s electronic transactions, processes, and systems. Thus, in designing electronic systems, departments and agencies should ensure that essential data are available when need and that the data and the underlying processes are legally sufficient, reliable and in compliance with all applicable legal requirements."

Acessible from our site at:

http://www.contracts.ogc.doc.gov/cld/othernews.html

Contract Law Network

Acquisition Law Focus

Distribution Statements on Technical Data

AMCOM IP Counsel **Anne Lanteigne**, DSN 746-5109, provides a paper on the gowing importance of distribution statements on technical data packages Encl 4).

Distribution Statements are markings that appear on technical data to indicate the scope of distribution, release and disclosure that the technical data can be subjected to. Distribution Statements comprise a set of codes "A" through "F", and "X", each of which affords to the technical data that is marked with it, a different level of protection from distribution.

The requirements to affix proper Distribution Statements to technical data produced by or for the Department of Defense are not new but have been around for a long time. They are contained in DoD Directive 5230.24. The low profile of this Directive in the general landscape of Government business in the past is understandable. Prior to the advent and wide use of the Internet, documents did not travel with such alarming ease and at such a hair-raising speed as they do now.

However, because of the recent boom in electronic commerce and the Department of Defense's increasing participation therein, among other reasons, the need for marking technical data with proper Distribution Statement codes has become more acute than ever. A proper Distribution Statement code affixed to technical data controls the release of the data.An example of DoD's participation in electronic commerce is using the web to issue solicitations and the technical data, if available, that is associated with the acquisition. To ensure adequate level of protection for the data, web solicitation normally can release only technical data that is marked with Distribution Statement code "A" which is authorization for unlimited distribution. Another reason to ensure tightened enforcement of the requirements of DoDD 5230.24 is increased Foreign Military Sales and international partnerships.

Financing Base Operations and Support Services

TACOM Counsel **Mike Walby**, DSN 786-8591 provides a legal opinion he rendered to a client addressing the issue of the appropriateness of changing the method of financing base operations and support functions (Encl 5).

The paper addresses AR 37-49, DFAS-IN-Manual 37-100-XX, Chapter 340, various DA policy memoranda, as well as the January 1999 AMC Policy for Base Support and Support Agreement Formulation.

The opinion addresses the possibility of a blanket or percentage assessment for base operations services.

In addition to the substance of the article the style used in responding is one that a client appreciates: each question is separately recited and addressed. This makes it easier on the reader.

Counsel Counsel

MSPB Amends Whistleblower Rules

The Merit Systems Protection Board recently amended its procedural rules concerning whistleblower appeals to assist in providing the information the Board needs to process these appeals, according to a press release.

Under the Whistleblower Protection Act (and court rulings interpreting the Act), a person who files a complaint with the Special Counsel alleging that a personnel action was taken or threatened because of whistleblowing must exhaust Office of Special Counsel (OSC) procedures before filing an appeal with MSPB. The Board may consider only those matters the person raised before the Special Counsel.

"This change in our rules is the result of a cooperative effort with OSC to help whistleblowers provide both of our offices with the information we need to process their cases," said Acting Board Chairman **Beth S. Slavet.**

"OSC revised its complaint form in August to include a new Part 2, Reprisal for Whistleblowing, in which a complainant describes each whistleblowing disclosure, identifies when and to whom the disclosure was made, describes the personnel action that was taken or threatened because of the disclosure, and provides the date of any such action or threat. This is the information the Board needs to determine whether the appellant has satisfied the WPA's requirement to exhaust OSC procedures before filing with MSPB."

The revised complaint form is available on the OSC web site at

www.osc.gov.

FLRA GC on Meetings

The General Counsel of the Federal Labor Relations Authority (FLRA), **Joseph Swerdzewski**, issued guidance yesterday to the FLRA Regional Directors regarding Meetings under the Federal Service Labor-Management Relations Statute (Statute).

The Guidance discusses the General Counsel's policy on the rights and obligations of unions and agencies in meetings with employees under the Statute. The memorandum provides guidance on the types of situations where employees have a right to union representation and where unions have a right to be represented when agency representatives meet with bargaining unit employees. The Guidance also provides checklists for supervisors, union stewards, and employees to utilize to determine whether a particular situation gives rise to a right to representation.

A copy of the guidance and an executive summary is available on the Authority's web page. The executive summary is at

http://www.flra.gov/gc/guidance/gc_meet_exs.html

Employment Law Focus

DOJ Issues ADR Report

On January 17, 2001 Attorney General **Janet Reno** today released a report on the successes and current state of alternative dispute resolution programs in the federal government to help agencies develop and maintain their programs in the new presidential administration, according to Department of Justice officials.

Jeff Senger, deputy senior counsel in DOJ's Office of Dispute Resolution,told ADRWorld.com that the Report of the Interagency Alternative Dispute Resolution Working Group (IADRWG) "highlights the value of ADR" in the federal government and lays out the "accomplishments of IADRWG, federal government agencies and administrative agencies in implementing the Alternative Dispute Resolution Act of 1998."

According to Senger, Reno is particularly pleased that one key goal — that every agency implement at least one new ADR program or significantly enhance a current ADR program — was met by "every cabinet level agency and most administrative agencies." The attorney general believes that the work and accomplishments of federal agencies over the past two years will provide a"foundation for future administrations to build on," he added.

The report also outlines agencies' plans for establishing new ADR programs in the future. For example, the IADRWG will establish a voluntary arbitration pilot program for resolving low-dollar claims against the federal government such as simple tort claims. The pilot program would be made available to all agencies that process claims against the government,and they could process cases involving as much as their statutory settlement authority, which is generally about $25,000. The claims could only be for monetary relief, and the agency would have the discretion to choose which disputes it believes are appropriate for arbitration.

Weingarten Rule Explained

Briefly, this statutory right provides that when an agency representative questions a bargaining unit employee, and the employee reasonably believes the questioning may result in disciplinary action against that employee and the employee requests union representation, the employee is generally entitled to representation if the investigation continues.

Upon a valid request for union representation from the employee, management has three options:

1) grant the request and notify the union that a meeting to examine a bargaining unit employee is going to take place and that the employee has requested union representation;

2) continue the investigation without interviewing the employee; or

3) offer the employee a clear choice to either continue the interview without representation, or have no interview.

Enclosed is a paper on Weingarten provided by HQDA's Labor Advisor **David Helmer** (Encl 6).

Employment Law Focus

Mandatory Removal For Law Enforcement Personnel-When Convicted Of Felony

Attached, for your information, is an info paper from OPM concerning Section 639 of P.L. 106-554, which add section 7371 to 5 USC Chapter 73 (Encl 7).

The new section is titled, "Mandatory removal from employment of law enforcement officers convicted of felonies." The new law requires that any law enforcement officer who is convicted of a felony shall be removed from employment as a law enforcement officer on the last day of the first applicable pay period following the conviction notice date. (The conviction notice date is the date the agency has notice that the officer has been convicted of a felony.) The specific legislation is included at the end of the OPM guidance.

The legislation provides for a shortened notice period and identifies the areas of appeal for actions taken under this section. The employee must still be given specific notice of the proposed removal, an opportunity to respond, and a final decision with appeal rights. The requirement is effective January 20, 2001, and it is not retroactive - only new convictions after that date apply. Where convictions are subsequently overturned, the employee is entitled to be returned to his/her position with back pay.

It is important to note that the law only requires that the employee be removed from a law enforcement position. It does not require that the employee be removed from the Federal service. That is, if management elects to reassign the employee out of the law enforcement position based upon his/her felony conviction, such action would be in compliance with section 7371.

Activities must read the law carefully and begin its implementation. A key aspect of the implementation is meeting your labor relations obligations.

Time off for Health Screening

Federal employees with limited available sick leave will be able to take up to four hours of additional paid time off each year for health screenings like mammography, pap smears, and blood pressure and cholesterol checks, according to an announcement by President Clinton.

The Federal Employees Health Benefits Program <../..//insure/health/index.htm>, the health insurance plan for federal employees, covers a wide range of preventive health services, including screening for prostate, cervical, colo-rectal and breast cancer and screening for sickle cell and blood lead levels.

The President's memorandum also wants agencies to step up health screenings by:

Providing preventive services through in-house health units.

Providing preventive services through on-site fitness centers

Encourage employee organizations to sponsor health activities.

Environmental Law Focus

Selling or Privatizing Military Utility Systems

OSC Counsel **Geraldine Lowery**, DSN 793-5932, has provided an outstanding article on a growing issue of concern to the contracting, environmental and real estate communities (Encl 8).

The authority for the military to sell or privatize its utilities was granted by Congress through the passage of Public Law 105-85. Sec 2688 of that law reads as follows:

"Utility systems: conveyance authority (a) Conveyance Authority.—The Secretary of a military department may convey a utility system, or part of a utility system, under the jurisdiction of the Secretary to a municipal, private, regional, district, or cooperative utility company or other entity. The conveyance may consist of all right, title, and interest of the United States in the utility system or such lesser estate as the Secretary considers appropriate to serve the interests of the United States".

The goal of the Department of Defense is to avoid the immediate expense of upgrading aging infrastructure by selling the systems to private entities. The costs of capital improvements will then be reimbursed to the utility company through utility rates over a period of time. The feasibility of privatization of each system is to be determined only after a full assessment of the system, evaluation of the market for all potential purchasers, and a careful comparison of costs associated with each alternative, including the alternative of keeping the system where there are no cost benefits or no willing purchasers. See Policies And Procedures For Privatization Of Army Owned Utility Systems At Active Installations.

The paper also addresses newly minted provisions of the Defense Authorization Act for FY 2001, applicable provisions of title 10 USC Sec 2304 (c), case law and legislative history.

Restoration Activities:DOD Issues Final Policy on Land Use Controls

On 17 January 2001, DoD issued the Final Policy on Land Use Controls Associated with Environmental Restoration Activities.

This policy provides an overall framework for implementing, documenting, and managing land use controls for active and transferring installations.

The policy establishes **a 72-hour DoD and other Service review requirement** for all land use control agreements. A copy of the DoD Policy is available at - https://www.denix.osd.mil/denix/Public/Library/Cleanup/luc_policyguidance.pdf.

If you have any questions, please call **Stan Citron**, DSN 767-8043.

Environmental Law Focus

President Orders Protection for Migratory Birds

On 10 January 2001 President Clinton signed Executive Order 13186, Responsibilities of Federal Agencies to Protect Migratory Birds, 66 Fed. Reg. 3853, January 17, 2001 (Encl 9).

Each Federal Agency taking actions that have, or are likely to have, a measurable negative effect on Migratory bird populations is directed to develop and implement, within two years, a Memorandum of Understanding (MOU) with the Fish and Wildlife Service that shall promote the conservation of migratory bird populations.

Some of the provisions of the Order do not go into effect until Agencies have entered into such MOUs with the Service. However, it would be prudent to ensure that environmental analyses of Federal actions required by NEPA or other established environmental review processes evaluate the effects of actions and agency plans on migratory birds, with emphasis of concern, as defined by the Order.

Environmental Law Bulletins--JAGCNet

The Environmental Law Division Bulletin for December and all future editions are now available electronically on the JAGCNet Environmental Forum, and we urge all interested in Environmental Law to become registered for access to that restricted Forum.

Going After the Polluters of Our Army Lands

Since February 1998, the Department of Defense has had a policy to identify and pursue all opportunities for the potential recovery or sharing of environmental restoration costs from DoD contractors and other parties, public and private, that may have contributed to environmental contamination of DoD properties.

The DoD Defense Environmental Restoration Program Management Guidance states that Services should pursue recovery of response costs of $50,000 or more.

Recently, the Corps of Engineers has awarded two indefinite delivery contracts for services to assess the potential recovery opportunities against such parties.

Our installations may avail themselves of this service, by contacting the Corps of Engineers as set forth in the enclosed letter (Encl 10).

Ethics Focus

Ethics Summary for AMC for Calendar Year 2000

Financial Dislosure:
Total Public Filers: 154
- Disqualifications: 42

Total Confidential Filers: 15.105
- Written notices of disqualification issued: 707
- Divestitures: 7
- Reassignments: 10

Ethics Training:
Total Employees Trained: 14,600

Disciplinary Actions
Disciplinary Actions: 153
- Misuse of position, resources, info: 135
- Indebtedness: 4
- Compensation from non-Federal sources: 6
- Impartiality in performing official duties: 1

Travel Alert: Secretary of the Army Travel Policy Changes

There have been significant devel opments in the Travel policy applicable to Department of Army personnel.

AMC Ethics Counsel **Mike Wentink**, DSN 767-8003, provides a copy of the Secretary of Army memorandum (Encl 11).

As one of the major changes, note that the AMC CG is now the approval authority for all USAMC accompanying spouse travel on MILAIR.

The policy sets forth the documentation that must be included in all requests for approval.

You should also note what has not chnaged: we still fly coach, and the rules for upgrading have not changed. The rules concerning frequent flyers remain the same. Further, travelers still may not use their "official" miles to upgrade their seat on TDY unless certain exceptions are present.

Department of Defense (DOD) and Department of the Army (DA) transportation resources are to be vigorously managed to prevent both the misuse and the perception of misuse. Travel must be directly and clearly related to mission achievement.

This document supersedes the Secretary of the Army memorandum subject: Policy for Travel by Department of the Army Officials, dated 8 April 1999. It implements specified policies and procedures provided by DOD Directive 4500.56, DOD Policy on the Use of Government Aircraft and Air Travel (1997). It also serves to reduce the cost of travel and prevent the inappropriate and perceived inappropriate use of DA travel resources by the implementation of these policies and procedures.

Counsel Advisor

Ethics Focus

Spouse Travel: What You Must Submit for Approval

a. Request signed by the sponsor;

b. Name, grade, and position/title of sponsor;

c. Purpose of spouse's travel;

d. Travel date and destination;

e. Type of conveyance, to include cost if a commercial flight;

f. Policy and/or fiscal determination by appropriate MACOM official;

g. Agenda or itinerary for spouse that indicates either actual participation or a diplomatic or public relations benefit to the United States.

Legal Assistance Preventive Law Item: Telemarketing Scams

CECOM's **Pamela McArthur**, DSN 992-4371, provides an excellent legal assistance preventive law note on Telemarketing Scams (Encl 12).

The paper is written in an easy-to-read manner for the client. For example:

Most people would be surprised to know that there are an estimated 14,000 illegal telemarketing operations bilking U.S. citizens of at least $40 billion annually.

All consumers, and seniors in particular, need to understand that these aren't just aggressive or "sleazy" salespeople trying to make a living — fraudulent telemarketers are hardened criminals willing to take their victims' life savings. They're so good at what they do, they can even persuade people to mortgage their homes in order to claim their sweepstakes winnings or make investments.

Studies by various agencies show that most fraud victims don't make the connection between illegal telemarketing and criminal activity. They simply don't associate the voice on the phone with someone who could be trying to steal their money.

Once they understand that illegal telemarketing is a serious crime — punishable by heavy fines and long prison sentences – people are more likely to hang up and report calls to the authorities.

* * * * NO SOLICITATION * * * *

In this Ethics Advisory reissue **Mike Wentink** describes the rules and exceptions regarding workplace solicitation (Encl 13)

The general rule is that employees may not solicit the sale of magazine subscriptions, cosmetics, household products, hair replacement systems, vitamins, candy, cookies, insurance, weight loss programs, etc. while on the job or in their offices. Even if off the job and outside the workplace, they may not knowingly solicit DoD employees who are junior to them.

Command Counsel Newsletter

Faces In The Firm

HELLO & GOODBYE...TO YOU

Arrivals

AMCOM

CPT Anthony C. Adolph is the new Legal Assistance Officer. He is a graduate of New York Law School. His last assignment was in Bamberg, Germany, where he was a military intelligence officer.

Gary J. Suttles joined Adversary Proceedings Division in December. He came to us from Social Security Administration in Savannah, and brings experience from both federal and state government service as well as private practice. He is a graduate of the Cumberland School of Law, Birmingham, AL.

Laura F. Owens is brand new to the federal government. She has been working as an Assistant City Attorney in Decatur, Alabama for the past five years before joining the Acquisition Law Division in January. She is a graduate of University of Alabama School of Law.

Wade L. Brown joined the Acquisition Law Division and farewell to MAJ Wade L. Brown as a "green suiter" with ten years of experience in the Judge Advocate General's Corps, of which the last 1 1/2 years have been in the AMCOM Legal Office.

HQ AMC

Sam Shelton has joined the General Law Division and will practice employment law, something he has done successfully at Ft. Belvoir, and most recently at ARL. You will know Sam as a leader in the design and implementation of the REDS ADR Program.

Retirement

AMCOM

Howard G. Garner retired from the Intellectual Property Law Division on 3 January 2001 after almost 25 years of government service as a patent attorney. He and his wife plan to remain in the Huntsville, Alabama area.

Promotions

AMCOM

Congratulations to **David C. Points, Jr.**, who was recently promoted to GS-0905-14, General Attorney in the General Law/Intellectual Property Law Division.

HQAMC

Cherell Lonon-Gerald has been promoted to GS-8 Legal Assistant in the Protest Litigation Branch.

Elaine Timberlake has been promoted to GS-8 Legal Assistant in the Business Operations Law Division.

Billy Mayhew has been promoted to GS-7 Legal Assistant in the Administrative Office.

Contains Privileged Information

An Economy Act Primer

This paper has been prepared for people who have the responsibility to bring business into the center; to provide services or supplies for other Armed Services or Civilian Agencies; or to acquire services and supplies from other agencies.

BACKGROUND

1. The Economy Act (The Act) is often cited and discussed, but rarely understood. The Act provides agencies the authority we use to provide services to or secure the services of another Executive agency for in house performance or performance by contract where there is no other statutory authority

2. The Act had it genesis during the great depression. Congress was looking for ways to curtail the expenses of government. It passed the Economy Act in 1932 to obtain economies by deleting duplicating and overlapping activities. Interestingly the legislative history reflects Congress belief that private industry should not be called upon to perform "what Government Agencies can do more cheaply for each other," and the Government Agencies "especially equipped to perform the work" should be available whenever work can be performed "as expeditiously and for less money" than elsewhere. Consequently the original act did not include the authority to contract.

3. The Congress amended the Act in 1942 to allow military servicing agencies the authority to contract and extended the authority to the civilian agencies in 1982. Using another government agency to contract for your requirements is called offloading.

4. Some DOD agencies abused their authority under the Act in the early nineties by offloading to circumvent funding restrictions or limitations. Agencies became unwitting partners in violations of the Antideficiency Act. This practice was called to a halt by a directive signed by the Secretary of Defense. Now we have extensive regulation of our use of the Economy Act.

5. The Economy Act is a valuable tool that you can use to economize, if you know what it is and how to use it. The purpose of this paper is to let you know its use and its limits.

The Economy Act

1. The Economy Act (The Act) begins

> The head of an agency or major organizational unit within an agency

may place an order with a major organizational unit within the same Agency or another agency for goods or services if ---

a. we have available funds; and

b. the order is in the best interests of the United States government; and

c. the agency filling the order can provide, or acquire by contract, the ordered goods or services; and

d. the ordered goods or services cannot be provided by contract as conveniently or cheaply.[1]

2. Under the Act, the requiring agency must pay "promptly by check on the written request of the agency filling the order."[2] Practically today the payment is made with a Military Interdepartmental Purchase Request (MIPR). This is another case where it pays to follow the advice of Jerry McGuire "Show me the money". It is a violation of the Purpose Statute and may result in a violation of the Antideficiency Act to spend our appropriated funds for the purpose of another service or agency appropriation. Ask for the money up front. When you spend another agency's funds, you obligate appropriated funds. You must be sure that SBCCOM receives the ordering agency's funds.

3. We have had a case where a lab did the work and then did not get paid. Never let that happen to you. It is one way to get to meet senior officials—but they won't be handing out awards.

4. An order does not irretrievably obligate funds.

a. The order placed requests the supplying agency to obligate an appropriation of the requiring agency.

b. The Act specifically provides that the "amount obligated is deobligated to the extent that the agency or unit filling the order has not incurred obligations, before the end of the period of availability of the appropriation" by either "providing the goods or services or making an authorized contract."[3] The servicing Agency must therefore proceed as if it were spending its own expiring appropriation. If it does not, the requiring agency is legally required to deobligate the funds.

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[1] 31 USC 1535 (a)
[2] 31 USC 1535 (c)

[3] 31USC 1535 (d)

c. Two duties are inherent in this statutory requirement. If you represent the requiring agency, you must monitor your MIPR. If you represent the servicing agency, an Economy Act Order MIPR does not of itself obligate funds. A MIPR is a request to obligate funds. You must expeditiously obligate the funds you receive.

d. **Example**--Several years ago a mask program sent an order to Lexington for storage of a quantity of items that it also shipped. Apparently customers overwhelmed Lexington with MIPRs at that time. It did not obligate the funds within the period of availability. It could not obligate the expired funds. The Mask program had to find current year funds to replace the expired funds.

THE REGULATIONS

1. The Economy Act is brief and easy to understand. You have often heard that the devil is in the details. Here the devil is in the procurement regulations, Federal Acquisition Regulation (FAR) 17.500 et. seq.; the Defense Federal Acquisition Regulation Supplement (DFARS) 217.500 et seq.; and the Army FAR Supplement (AFARS) 17.5 et seq. Wending your way through these regulations and related message traffic helps you understand why the Act has been the source of some confusion. Understanding the regulations is worth the effort because the Economy Act can be a valuable tool if we use it correctly. If you don't know how to use it, misuse of the Act can lead to criminal violations of the law

2. The **FAR** tells us

a. we can't use the Act to circumvent conditions and limitations on funds.[4] What it doesn't say there is even more important. Circumventing conditions and limitations on funds can violate the Anti Deficiency Act by spending in excess of an appropriation or exceeding an apportionment or otherwise avoiding limitations on appropriated funds. You must expend appropriated funds in the amounts, for the purpose, and within the time required by an appropriation.

b. acquisitions under the Economy Act are not exempt from the requirements of OMB Circular A-76, Performance of Commercial Activities.[5] That means you cannot avoid A-76 by the use of an Economy Act offloading order.

[4] FAR 17-502(b)
[5] FAR 17-502 (c)

c. we can't use the Economy Act for acquisitions that conflict with any other agency authority;[6] for example, the Administrator of General Services under the Federal Property and Administrative Services Act.

3. The regulations require two primary documents. The first is a Determination and Findings (D&F) that establishes the Economy Act as the authority for the transaction. The second document is the Order constituting the agreement between the requiring and servicing agencies on the statement of work, payment for supplies or services, and related terms and conditions.

4. From this point on, this paper will describe these two documents by examining the FAR, DFARS, and AFARS requirements for each. Watch for the differences between orders intended to be performed in house and to be offloaded to contractors.

The Economy Act D&F

1. The FAR requires <u>all</u> D&Fs to contain two statements:
1

a. the use of an interagency acquisition is in the best interests of the Government; and

b. the supplies or services cannot be obtained as conveniently or economically by contracting directly with a private source[7]

2. If the order contemplates the servicing activity will provide the supplies or services by contract, then the FAR requires one of three additional statements in the D&F;

a. the servicing activity will place the order under a preexisting contract for the same or similar goods or services; or

b. the servicing agency has capabilities or expertise not available within the ordering agency;

c. the law or a regulation specifically authorizes the servicing agency to procure the supplies or services for other agencies.[8]

[6] FAR 17-502 (d)
[7] FAR 17.503(a)
[8] FAR 17.503(b)

3. The Determination and Finding" (D&F)[9] is a significant document. The first statement in the FAR ordering section also requires the D&F "Before placing an Economy Act order for supplies or services with another Government agency, the requesting agency shall make the D&F . . . ."[10]

4. The DFARS has only two brief paragraphs on the D&F: First " . . .the procedures in FAR Subpart 17.5, this subpart and DODI 4000.19 apply to all purchases, except micro-purchases, made for DOD by another agency."[11] (DODI 4000.19 is entitled Interservice and Intragovernmental Support). The second DFARS paragraphs states "If requested, the Contracting Officer who normally would contract for the requesting activity should advise in the determination process." [12]

5. This "if requested" language in the DFARS is weak. The preferred course of action is to work with your normal contracting office. The instruction cited in that same DFARS section, DODI 4000.19 states as DoD policy "DoD activities that require support from other sources should first consider using support capabilities available from the activity's host . . . ."[13] Before you make the statement in paragraph 2. b. above, check with your supporting Contracting Officer or the office which normally contracts for the item or service you want to order to determine if the capability and capacity exist in SBCCOM to satisfy your contracting requirement.

6. The **AFARS** covers contract offloading first. It tells us that before we release Economy Act Order outside of DOD for contracting action:

a. a written determination shall be reviewed by legal counsel and coordinated
with the requiring activities supporting Army Contracting office prior to execution;[14]

b. we must use a particular format for D&Fs;[15]

c. authority to approve the D&F has been delegated to a level no lower than a SES/General officer who is a Commander/Director of the requesting activity;[16]

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[9] FAR 17.503(a)
[10] FAR 17.504(a)
[11] DFARS 217.500(b)
[12] DFARS 217.503(c)
[13] DODI 4000.19 para 4.1
[14] AFAFS 17.503(a)
[15] AFARS 53.9008
[16] AFARS 17.503(c)(ii)

d. The Army Senior Procurement Executive must approve the D&F in advance of execution for an order to any agency not covered by the FAR; [17] and finally,

e. D&Fs shall be signed and approved prior to execution of any Order

6. The AFARS also briefly speaks to D&Fs in support of orders for organic support.

a. the determination required by the Act (see the Economy Act section of this Primer) shall be prepared by the project sponsor and approved at a level higher after coordination with legal and contracting; and

b. the requirements for contracting outside of DOD (see the discussion at paragraph 2 above) "shall be tailored as appropriate to the transaction recognizing that no contracting action is anticipated.

8. The DOD Far Supplement (DFARS) requires you to provide a copy of the executed D&F to any DOD servicing activity. When you are the servicing activity, the DFARS requires the contracting activity to obtain a copy of the executed D&F from the requesting Agency and place it in the contract file.

9. The Regulatory guidance for D&F gives you most of the language required, but the requiring activity must verify that the statements are true for any particular Order. The regulations provide a format for the D&F and state who has the authority to execute the document. This level of detail is required because of past abuses. A common misperception arose that once the servicing agency had the funds in a carrier account it could use them any way, any time it wanted to. An appropriation does not loose its character when a MIPR transfers funds to another agency. Before it places an Economy Act Order, the requiring agency must go on record stating that the authority provided by the Act applies to the intended transaction and clearly identify the appropriation covering the transactions and any limitations such as the date that appropriation expires.

10. In DoD the D&F is a significant Document:

> When the requesting agency is within DoD a copy of the executed D&F shall be furnished to the servicing agency as an attachment to the order. When a DoD contracting office is acting as the servicing agency, a copy of the executed D&F shall be obtained from the requesting agency and placed in the contract file for the Economy Act order.[18]

[17] AFARS 17.503(c)(iii)

As a matter of course when you send an Economy Act Order include a copy of the D&F. It is a sign of your good faith and establishes a practice that every one of your orders is soundly based.

THE ECONOMY ACT ORDER

1. An **Economy Act Order** is the document you send or receive that initiates the transaction. It is a written agreement between the requiring and servicing agencies. The elements of that agreement required by the FAR are:

a. a description of the supplies or services required;

b. delivery requirements;

c. a funds citation;

d. a payment provision;

e. appropriate acquisition authority; [19]and

f. a dispute resolution provision [20]

2. The FAR provides "The Order may be placed on any form or document that is acceptable to both agencies."[21] Typically DoD agencies use a MIPR to serve the dual function of transferring funds and including the required terms and conditions.

3. The list in paragraph 1 is not just a list of regulatory requirements. If you represent the requiring agency, this order is your ticket to getting what you ordered on time, at a particular price, paid at a time certain, and an agreement to use a particular method to resolve any problems that might arise during the performance of the Order. These are the minimum factors a steward of public funds must take into account before he spends the taxpayers' money. You must know and communicate this type of information to the servicing activity. If you represent the servicing activity, the Order lets you know what your obligations are when you accept the MIPR. It firmly establishes what you have to do; what amount of funds you will receive; when you will get them (remember Jerry McGuire); and how you can resolve disputes.

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[18] FAR 17.504(a)
[19] FAR 17504 (b) (1-5)
[20] FAR 17.504
[21] FAR 17504 (b)

4. You may be wondering what the appropriate acquisition authority in paragraph 1 e. is. This is where contract offloading is described. Those authorities are:

a. a Justification and Approval (J&A) or a D&F if the law or regulations require these contractual documents to support the proposed acquisition. The servicing activity must execute the documents, but the ordering agency shall furnish any information needed.[22] Your contracting folks and your lawyer can help you prepare these documents;

b. other assistance as necessary to support your acquisition, such as particular contract terms needed to comply with funding conditions or limitations;[23]

5. Note that the requiring agency is responsible for creating the J&A and the D&F and furnishing this type of information. However, the servicing agency is responsible for compliance with all other legal and regulatory requirements that apply to the contract, such as having statutory authority for the action or complying with requirements for competition. [24]

6. The AFARS requires that contracting requirements shall be presented as a complete procurement package including at a minimum:

a. any determinations or acquisition approvals required by regulations

b. certified documentation in support of any request for other than full and open competition.

c. MIPR with citation of appropriate funds and the basis of payment (reimbursable order, direct cite) and information on any limitations on the duration of the funds to be transferred,

d. a detailed statement of work appropriate for use in a solicitation or contract; and

e. contract administration requirements, such as required reports, acceptance criteria, and technical POC.[25]

[22] FAR 17.504(d)(1)
[23] FAR 17.504(d)(2)
[24] FAR 17.504 (d(3)
[25] AFARS 17504 (d) (2)

7. There is another condition that is helpful to know. You may proceed normally as long as the Agency you are working with is covered by the Federal Acquisition Regulation. But if you are dealing with an Agency that is not covered by the FAR**,** then your Economy Act Order must be approved in advance by the Army Senior Procurement Executive in the Pentagon. The TVA and the Library of Congress are examples of agencies not covered by the FAR.

CONCLUSION

1. The Economy Act is a tool we can use to curtail expenses of Government. Normally we expect to use our internal capabilities and contracting capabilities to accomplish our mission. We can use Economy Act authority to obligate funds to satisfy our mission needs cheaply and conveniently by taking advantage of the expertise and capabilities of another agency.

2. A servicing agency must obligate funds in a timely manner by beginning work or contracting in a timely manner. Requiring agencies have a duty to monitor orders to ensure that the servicing agency honors Appropriation/Authorization Act periods of availability. Customers deserve prompt performance.

3. The Economy Act regulations require minimum documentation to ensure that the buyer and seller have a meeting of minds and understand what is expected from the order. Both parties must know the work required by the order; there is money behind the order; when it will be paid; and how they expect to resolve any unforeseen disagreements.

4. The Economy Act is not a tool for all purposes but, used properly, this authority can help you avoid expenditures; save time; and acquire services we currently do not have.

AMCCC-B-IP POINT PAPER 28 December 2000

PURPOSE: To Update Staff on Recent Changes to Technology Transfer Laws

SUBJECT: The Technology Transfer Commercialization Act of 2000

O Congress recently passed the Technology Transfer Commercialization Act of 2000. The Act's goals are to make the technology transfer process more "industry-friendly", as well as to simplify technology licensing.

O Among other things, the Act permits licensing certain pre-existing patents related to Cooperative Research and Development Agreements ("CRADAs"). While this has always been permitted, it was sometimes procedurally difficult because the license and CRADA were in two separate agreements. Now this licensing can occur where:

oo The invention is federally owned;

oo The patent application is signed before signing the CRADA; and

oo The invention is directly within the scope of work under the CRADA.

O The Act continues to permit exclusive and partially-exclusive licenses under essentially the same conditions as before; however it now reduces the notice and comment period from two months to fifteen days. This notice requirement does not apply to licenses under CRADAs using the authority of 15 USC 3710a.

O In addition, the Act allows Federal laboratories to acquire rights in inventions which are co-invented with a non-profit organization, small business firm, or a non-Federal co-inventor. While this practice has been previously permitted, the Act explicitly legitimizes it for technology transfer purposes. In order to rely on this authority, the licensor must voluntarily enter into the transaction.

O The Act also broadens the potential subject matter of Government licenses. Previously, agencies were permitted to grant licenses under federally-owned patent applications and patents. Now we can grant licenses under federally-owned inventions – a slightly broader category that includes any invention or discovery that is or may be patentable. This includes patentable software for which no patent application has been filed.

O The Act clarifies the calculation of royalty payments to inventors. Although the payment amounts and percentages remain the same, the basis for payment calculations now excludes patent costs called out in the license or assignment agreement.

O The Act also clarifies that inventors must assign their rights to the Government in order for the inventors to share in royalties.

O The Act limits the circumstances under which certain high-revenue royalties are returned to the U.S. Treasury. Before, we had to return 75% of all royalties to the Treasury where the total amount, after payments to inventors, was greater than 5% of the laboratory's budget. Now, we must return 75% of all royalties to the Treasury where the total amount, after payments to inventors, is greater than 5% of the agency's budget.

O The Act expands the royalty's period of availability from two to three fiscal years.

O The Act adds "institutions of higher education" as among those groups authorized to serve as partnership intermediaries.

O The Act also adds a review and report requirement on CRADA procedures, with an emphasis on those CRADAs that involve critical national security technology or may have a significant impact on domestic or international competitiveness.

O Finally, the Act adds a new agency reporting requirement to the Office of Management and Budget. Among other things, the report must include an explanation of the agency’s technology transfer program, the number of patent applications filed, the number of patents received, the number of fully executed licenses which received royalty income, as well as total earned royalty income.

ACTION OFFICER:
LISA SIMON
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AMCCC-B-IP
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Proprietary Tech Data

In a recently distributed advisory (Office of Command Counsel Newsletter, August 2000, Volume 2000-4) the proper handling was delineated for proprietary technical data received from others such as contractors. The following response was prepared for a reader of the advisory who requested a clear explanation for understanding of what this term covers.

Initially it should be understood that proprietary data is not limited to data as usually used in our parlance of government terminology. Generally speaking, it is any information developed and possessed by one party that provides a competitive advantage over others. So it can take on various different forms. Outside the government, it is often just referred to as proprietary information. Some examples would be a list of customers that are specific to a company or a specific product/market. Usually this information was compiled by a study involving an investment or the expenditure of some effort or other resources resulting in specialized and valuable information creating an ownership stake. Such information must not be in the public domain so that it is not generally known. When such information is owned or developed by corporations, they may refer to it as a trade secret. It could take the form of technical or test data, specifications (TDPs),or other types of design information but it would not be limited to any of these as long as it complies with the general characteristics of not being known by others and having some value that provides a competitive advantage.

The general practice for maintaining the proprietary status of such protected information when given to a third party outside of a company follows an established procedure. First such information is usually documented in written form. Second, it is clearly labeled as proprietary. Then it is also provided under a restrictive agreement. Typically the agreement is referred to as a nondisclosure agreement wherein the recipient of the proprietary information is obligated to keeping it secret or in confidence while being given a right to use the information in a manner consistent with the business purpose that it was provided for under the release conditions. These agreements generally authorize a use for the proprietary information by the recipient and set up obligations serving to prevent others from accessing so they may learn of it without being subject to maintaining its secrecy.

Violation of the terms of the agreement is actionable under the law as a matter of civil law wherein damages and other measures may be enforced in an attempt to put the owner of the information back into the position they were in before the unrestricted disclosure or breach occurred.

Now since the government must rely on companies and other parties through contracts to perform its mission, federal employees often are in the possession of such information that was developed at private expense or not totally funded by the government. Accordingly we are obligated to protect the information from outside disclosure although we need its use to support our work in carrying out the mission. Due to the extensive use of support contractors in the government, we must always be aware of the status of who receives the information and if that is consistent with the ownership rights of the provider of the information. Access to the information and its use is considered a license. Often the use is

restricted to government purposes. The owner otherwise retains control and property (proprietary) rights over the data/information which usually has to do with its commercial value in the market place.

The access by individuals to such information in a company or in an organization although controlled is not so formalized because they are bound already through previously executed documents to keep it secret. Federal employees are also subject to Federal Law known as the Trade Secrets Act imposing criminal sanctions for unlawful disclosure. Such disclosure would also be inconsistent with the rights of the owner or the party that developed the information. If there is a need to disclose for a government purpose, permission should be obtained from the owner and then also the information is provided under a nondisclosure agreement. The recipient is therefore obligated to respect the ownership rights by not doing anything inconsistent with the rights of the lawful owner of the information who is said to retain proprietary rights in the information.

It should be understood that since each of the circumstances for application of legal terminology and principles are somewhat different, a concise treatment of a particular topic, however informative, is not a substitute for legal advice.

Submitted by John F. Moran, TACOM-ARDEC, IP TEAM LEADER, DSN 880-6590

THE ROLE AND IMPORTANCE OF DISTRIBUTION STATEMENTS ON TECHNICAL DATA

Distribution Statements are markings that appear on technical data to indicate the scope of distribution, release and disclosure that the technical data can be subjected to. Distribution Statements comprise a set of codes “A” through “F”, and “X”, each of which affords to the technical data that is marked with it, a different level of protection from distribution.

The requirements to affix proper Distribution Statements to technical data produced by or for the Department of Defense are not new but have been around for a long time. They are contained in DoD Directive 5230.24. The low profile of this Directive in the general landscape of Government business in the past is understandable. Prior to the advent and wide use of the Internet, documents did not travel with such alarming ease and at such a hair-raising speed as they do now. However, because of the recent boom in electronic commerce and the Department of Defense’s increasing participation therein, among other reasons, the need for marking technical data with proper Distribution Statement codes has become more acute than ever. A proper Distribution Statement code affixed to technical data controls the release of the data. An example of DoD’s participation in electronic commerce is using the web to issue solicitations and the technical data, if available, that is associated with the acquisition. To ensure adequate level of protection for the data, web solicitation normally can release only technical data that is marked with Distribution Statement code “A” which is authorization for unlimited distribution. Another reason to ensure tightened enforcement of the requirements of DoDD 5230.24 is increased Foreign Military Sales and international partnerships.

When technical data is initially produced by or for the Department of Defense, the controlling DoD office has the responsibility to determine the proper Distribution Statement code for that technical data before it releases the data to any recipient (i.e. primary distribution). Any secondary distribution (i.e. release of technical documents

made after primary distribution by other than the originator or controlling office) of the technical data must be within the purview of the Distribution Statement code appearing on that data. Any distribution outside this purview requires additional approvals or authorizations from the controlling DoD office.

The controlling DoD office is defined as the DoD activity that sponsored the work that generated the technical data in question or received the technical data on behalf of the Department of Defense. The controlling DoD office is deemed to be in the best position to determine the proper Distribution Statement code since it manages the technical programs that generated the technical data and has best notion regarding how freely the data may be distributed. The Distribution Statement codes that are determined to be appropriate by the controlling DoD office remain in effect until changed or removed by the same controlling DoD office. The determination or cancellation of an appropriate Distribution Statement code from technical data is not the responsibility of the document repository where the technical data may be stored or the responsibility of the office handling the Freedom of Information Act requests.

The controlling DoD office takes several factors into consideration in determining which Distribution Statement code is the most appropriate for a given technical document. These factors include: 1. Is the document classified? 2. Does it include contractor's limited rights data? 3. Does it contain export-controlled technical data? 4. Does it contain foreign government information? 5. Does it contain information on potentially patentable inventions? The Distribution Statement thusly assigned determines the extent of secondary distribution that can be made by the initial recipients. Any further distribution beyond the authorized secondary distribution cannot be made without additional approvals. Only the controlling DoD office, if it deems appropriate, may grant such additional approvals or authorizations.

Recently at the Army Aviation and Missile Command, a committee made up of representatives of various organizations that deal with technical documents produced a policy and standard practice to emphasize the importance of marking technical documents

with proper Distribution Statement codes and to assist personnel in the on-going implementation of DoDD 5230.24.

Action Officer: H. K. (Anne) Lanteigne
AMCOM Legal Office, General/ Intellectual Property Law Div. 256-876-5109

AMSTA-LA December 4, 2000

MEMORANDUM FOR

SUBJECT: Request for Legal Opinion

1. Your request, dated 30 November 2000, to the Chief Counsel for a legal opinion has been referred to me for response. This memorandum addresses your concerns regarding the appropriateness of changing the method of financing base operations/support functions (BASEOPS) and other services at TACOM. As you know, one of the identified options is to charge mission accounts for BASEOP services which are provided above the common level of support. It is interesting to note that your organization participated fully in the development of these options. I will attempt to address your concerns seriatim.

   a. Paragraph 3a. of your memorandum states: "It has been proposed to pay the tenant assessments at Rock Island Arsenal and Watervliet Arsenal from mission and customer funds. Currently TACOM finances these support costs with OMA BASEOPS. This method of OMA BASEOPS financing is in accordance with Army Reimbursement Policy as support by AR 37-49, Budgeting, Funding and Reimbursement for Base Operations Support of Army Activities."

   AR 37-49 was rescinded in a memorandum issued by the Department of the Army (DA) on 19 May 1995 (Enclosure 1). DA's memorandum was entitled "US Army Base Support Reimbursable Policy". Under the Army Reimbursable Policy, there is no prohibition against using mission/customer funds to pay the base support costs outlined in the TACOM option. Indeed, in a message dated 27 May 1997 (Enclosure 2), DA directed that Army tenants with different appropriations than the host that have received their own independent funding in the past will transfer such funding to the host who will provide a common-level of BASEOPS support. The message then states that the tenant "will reimburse the host for base support services above standard levels." Thus, it seems clear that the Army policy directs Army customers with different appropriations than the host to use their mission funds if they want to purchase BASEOPS above the common level of support.

   b. Paragraph 3b of your memorandum states: "Proposals have also been made to charge other appropriations for other base operations services such as communications, postage, logistics and public works support."

   The Legal Office is not aware of any attempt to institute a blanket or percentage assessment for base operations services. As you are aware, the TACOM option only addresses the use of mission/customer funding from tenants/internal organizations for those services **sought by that tenant/internal organization** that are **above the common-level of support provided by the host organization.** Host organizations are still required to provide a common-level of support for themselves and their tenants/internal organizations Due to unfinanced requirements created by the identified funding shortfall we are facing, TACOM is going to have to reduce (and possibly eliminate) the common level of support. In this case, "(t)enants may then buy back the level of support they deem necessary" on incremental and reimbursable bases. AMC Policy for Base Support and Support Agreement Formulation dated 21 January 1999 (Enclosure 3). TACOM's option is clearly in conformance with Army and AMC policies because only those tenants/internal organizations that seek services above the common-level of support must reimburse the host. TACOM's option does not assess any tenant/internal organization for any services not requested by that tenant/internal organization.

c. Paragraph 5 of your memorandum states: "I have also been made aware that potential OMA shortfalls exist in the central procurement account for acquisition and legal support. It again has been proposed to pass these shortfalls to customers and corresponding RDTE and PAA appropriations. Accordingly, request your thoughts on this matter as well."

As I said in the last DTV we had on UFRs, Tony Gianfermi and I researched the issue of using other than the OMA central procurement account to fund acquisition positions. We have used other than OMA to fund certain lawyer positions for years. This has been based on an organization's willingness to fund services over and above what would otherwise be the common-level of support. In the case of the RDTE appropriation, for example, we believe that support for this practice is found in DFAS-IN Manual 37-100-XX, Chapter 340. In the case of using other than OMA to fund acquisition positions, Tony and I found no dispositive guidance one way or the other. I think it's appropriate to apply the reimbursable guidance identified above and therefore think that organizations wanting acquisition services over and above the common-level of support can use their mission/customer funds to pay for such services.

1. At no time have I sensed that anyone thinks that the options we've identified are a good idea or the right thing to do. They are the products of truly desperate times. I think what's been identified over and over again is the mission failure that is going to occur if we don't get our shortfalls funded. It is my opinion that the options TACOM has developed are legal. It is also my supreme hope that we don't have to implement any of them.

2. Please feel free to contact me or Mike Walby if you have other questions or need clarification. I can be contacted at DSN 786-5493; bacone@tacom.army.mil. Mike Walby can be reached at DSN 786-8591; walbym@tacom.army.mil. This opinion has been coordinated with Resource Management, TACOM-Warren.

EMILY SEVALD BACON
Deputy Chief Counsel/Chief, General Law Division

Weingarten

For those new to the labor relations field (and as a reminder for those more experienced Labor Relations Specialists), Title 5 United States Code (USC) section 7114(a)(2)(B), Representation rights and duties, provides that:

> (2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at -
> (B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if -
> (i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and
> (ii) the employee requests representation.

This right is commonly referred to as the "Weingarten" right, based on the U.S. Supreme Court's private sector labor decision in, NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975).

Briefly, this statutory right provides that when an agency representative questions a bargaining unit employee, and the employee reasonably believes the questioning may result in disciplinary action against that employee and the employee requests union representation, the employee is generally entitled to representation if the investigation continues.

Upon a valid request for union representation from the employee, management has three options:

1) grant the request and notify the union that a meeting to examine a bargaining unit employee is going to take place and that the employee has requested union representation;
2) continue the investigation without interviewing the employee; or
3) offer the employee a clear choice to either continue the interview without representation, or have no interview.

Additional information regarding "Weingarten" rights can be obtained in PERMISS at http://www.cpol.army.mil/permiss/4122.html

In addition to affording employees these "Weingarten" rights, the Statute, at 5 USC section 7114(a)(3), requires each agency to "annually inform its employees of their rights under paragraph (2)(B) of this subsection." That is, each year, management must notify bargaining unit members of their statutory "Weingarten" rights. Typically, this is accomplished around the beginning of the new year.

Assuming you completed your annual notice last year, you'll probably just want to follow the same procedures. If your installation has a new labor relations specialist and no one is aware of the procedures followed last year, here are some suggestions for accomplishing the annual notice:

1) Prepare a desk drop for all unit employees, quoting the Federal Service Labor-management Relations Statute, section 7114(a)(2)(B),

2) Put a notice in the post newspaper,
3) Distribute the notice via e-mail to all unit employees,
4) Post the notice on all organizational bulletin boards, etc.

The bottom line is that your installation should employ the method that best ensures the widest distribution of the annual "Weingarten" notice to all bargaining unit employees. Of course, you should always check your collective bargaining agreement to see if it prescribes the procedures to be used for this notification.

If your installation does not have a set procedure for distributing the "Weingarten" notice, you may want to consider having your partnership council discuss this matter.

Keep in mind that the "Weingarten" notice is not like a Miranda warning --management is not obligated to notify unit employees of their right to representation at the time an employee is questioned. Rather, the Statute requires only that we notify our bargaining unit employees once a year regarding this right. You should note, however, that the Federal Labor Relations Authority has found union proposals negotiable that require management to notify an employee of his or her "Weingarten" right whenever an agency representative questions the employee. Should the union raise this type of proposal during your discussions regarding the annual notification, we recommend that you generally not agree to it. Of course, since labor relations is a command program, activities are free to agree to this type of language if your command believes it is in its best interest to do so.
>

New Law Requires Removal of Federal Law Enforcement Officers Convicted of Felonies

The recently signed Treasury and General Government Appropriations Act, 2001 includes a provision that requires removal of a law enforcement officer who is convicted of a felony. The provision, which is in Section 639 of P.L. 106-554, amends Chapter 73 of title 5, U.S.C. to add section 7371. The new law is effective on January 20, 2001, and covers only convictions that occur after that date. The verbatim text of the law follows this summary of its key concepts:

Who

The law uses the definitions of "law enforcement officer" found in 5 USC 8331(20) or 5 USC 8401(17).

What

The Officer must be removed from holding a law enforcement position, but need not be removed from Federal service if the agency can effect a reassignment within the required time frame, and wants to do so. The law specifically "does not prohibit the employment of any individual in any position other than that of a law enforcement officer." The law does not require an agency to cancel or delay a removal it was taking or had taken under other provisions, so long as the employee is out of the law enforcement position by the required date.

When

The agency must remove the employee from the law enforcement position on the last day of the first full pay period after the agency receives notice of the felony conviction. It will be critical that the offices within your agency that are likely to receive such notice understand the significance, and know to whom they must transmit that information, or what other steps they are expected to take.

How

The new law streamlines the procedures that agencies will follow if one of their law enforcement officers receives a felony conviction. The 30-day advance notice applicable to adverse actions explicitly does not apply. The employee will still get written notice of the impending removal no later than 5 days after the agency has notice of the conviction. The employee will also have an opportunity to reply, the right to be represented by an attorney or other representative, and the right to a written decision letter. However, reply and appeal rights are limited to whether: (A) the employee is a law enforcement officer; (B) the employee has been convicted of a felony; and, (C) the felony conviction has been overturned on appeal. Additionally, neither delay in meeting these requirements nor the filing of an appeal can delay the effective date of the removal. If an employee who has been removed under this provision is successful in having the conviction

overturned on appeal, the removal is retroactively “set aside,” and the employee is entitled to back pay.

SEC. 639. MANDATORY REMOVAL FROM EMPLOYMENT OF FEDERAL LAW ENFORCEMENT OFFICERS CONVICTED OF FELONIES.

(a) In General. --Chapter 73 of title 5, United States Code, is amended by adding after subchapter VI the following:

``SUBCHAPTER VII--MANDATORY REMOVAL FROM EMPLOYMENT OF CONVICTED LAW ENFORCEMENT OFFICERS

``§7371. Mandatory removal from employment of law enforcement officers convicted of felonies

``(a) In this section, the term--

``(1) `conviction notice date' means the date on which an agency that employs a law enforcement officer has notice that the officer has been convicted of a felony that is entered by a Federal or State court, regardless of whether that conviction is appealed or is subject to appeal; and

``(2) `law enforcement officer' has the meaning given that term under section 8331(20) or 8401(17).

``(b) Any law enforcement officer who is convicted of a felony shall be removed from employment as a law enforcement officer on the last day of the first applicable pay period following the conviction notice date.

``(c)(1) This section does not prohibit the removal of an individual from employment as a law enforcement officer before a conviction notice date if the removal is properly effected other than under this section.

``(2) This section does not prohibit the employment of any individual in any position other than that of a law enforcement officer.

``(d) If the conviction is overturned on appeal, the removal shall be set aside retroactively to the date on which the removal occurred, with back pay under section 5596 for the period during which the removal was in effect, unless the removal was properly effected other than under this section.

``(e)(1) If removal is required under this section, the agency shall deliver written notice to the employee as soon as practicable, and not later than 5 calendar days after the conviction notice date. The notice shall include a description of the specific reasons for the removal, the date of removal, and the procedures made applicable under paragraph (2).

``(2) The procedures under section 7513 (b) (2), (3), and (4), (c), (d), and (e) shall apply to any removal under this section. The employee may use the procedures to contest or appeal a removal, but only with respect to whether--

``(A) the employee is a law enforcement officer;

``(B) the employee was convicted of a felony; or

``(C) the conviction was overturned on appeal.

``(3) A removal required under this section shall occur on the date specified in subsection (b) regardless of whether the notice required under paragraph (1) of this subsection and the procedures made applicable under paragraph (2) of this subsection have been provided or completed by that date.".

(b) Technical and Conforming Amendment .--The table of sections for chapter 73 of title 5, United States Code, is amended by adding after the item relating to section 7363 the following:

``SUBCHAPTER VII--MANDATORY REMOVAL FROM EMPLOYMENT OF LAW ENFORCEMENT OFFICERS

``7371. Mandatory removal from employment of law enforcement officers convicted of felonies.".

(c) Effective Date .--The amendments made by this section shall take effect 30 days after the date of enactment of this Act and shall apply to any conviction of a felony entered by a Federal or State court on or after

Purchase Of Electric Commodity In Kentucky – Legal Opinion

BACKGROUND:

According to Contracting, as stated in a request for a legal opinion:

> Comments on the draft RFP [for Blue Grass Army Depot electrical system] were received from Kentucky Utility (KU) and Blue Grass Energy, Inc. (BGE) that have franchised territories bordering the BGAD installation. Comments from KU on the draft RFP state: "KU questions the legality of BGAD purchasing electricity from another supplier. Our rate department is investigating this issue." Comments from BGE state: "Blue Grass Energy's greatest concerns have to do with 1) the legality of the Government's intentions to procure the electrical commodity on a competitive basis;"
>
> BGAD's intent was to allow offerors to propose on the commodity, make it "optional", and by combining it with the privatization effort they would get the best value and deal with only one contractor….I am requesting a written legal opinion on the question of whether we can include the commodity as part of the solicitation in any fashion without violation of Section 2688 or other procurement statutes and regulations?

I. THE RIGHT TO PRIVATIZE THE UTILITY SYSTEMS

The authority for the military to sell or privatize its utilities was granted by Congress through the passage of Public Law 105-85. Sec 2688 of that law reads as follows:

> Utility systems: conveyance authority (a) Conveyance Authority.--The Secretary of a military department may convey a utility system, or part of a utility system, under the jurisdiction of the Secretary to a municipal, private, regional, district, or cooperative utility company or other entity. The conveyance may consist of all right, title, and interest of the United States in the utility system or such lesser estate as the Secretary considers appropriate to serve the interests of the United States.

The goal of the Department of Defense is to avoid the immediate expense of upgrading aging infrastructure by selling the systems to private entities. The costs of capital improvements will then be reimbursed to the utility company through utility rates over a period of time. The feasibility of privatization of each system is to be determined only after a full assessment of the system, evaluation of the market for all potential

purchasers, and a careful comparison of costs associated with each alternative, including the alternative of keeping the system where there are no cost benefits or no willing purchasers. See Policies And Procedures For Privatization Of Army Owned Utility Systems At Active Installations

In the initial legislation, Congress specifically mandated that if more than one entity expresses an interest in a system, the government must employ methods of full and open competition for the system. According to section 2688(b):

> Selection of Conveyee.--If more than one utility or entity referred to in subsection (a) notifies the Secretary concerned of an interest in a conveyance under such subsection, the Secretary shall carry out the conveyance through the use of competitive procedures.

The National Defense Authorization Act For Fiscal Year 2001, P.L. 106-398, Sec. 2813, "Conveyance Authority Regarding Utility Systems Of Military Departments", added two new paragraphs, codified at 10 USC 2688 (b)2 & (b)3, bearing upon the issue of open competition in the sale of the systems. The first new paragraph reads:

> (2) Notwithstanding paragraph (1), the Secretary concerned may use procedures other than competitive procedures, but only in accordance with subsections (c) through (f) of section 2304 of this title, to select the conveyee of a utility system (or part of a utility system) under subsection (a).

Title 10 USC 2304(c) contains the circumstances which are prerequisite to a limited competition:

> (c) The head of an agency may use procedures other than competitive procedures
> only when--
>
> (1) the property or services needed by the agency are available from only one responsible source or only from a limited number of responsible sources and no other type of property or services will satisfy the needs of the agency;
>
> (2) the agency's need for the property or services is of such an unusual and compelling urgency that the United States would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals;
>
> (3) it is necessary to award the contract to a particular source or sources in order

(A) to maintain a facility, producer, manufacturer, or other supplier available for furnishing property or services in case of a national emergency or to achieve industrial mobilization,
(B) to establish or maintain an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center, or
(C) to procure the services of an expert for use, in any litigation or dispute (including any reasonably foreseeable litigation or dispute) involving the Federal Government, in any trial, hearing, or proceeding before any court, administrative tribunal, or agency, or to procure the services of an expert or neutral for use in any part of an alternative dispute resolution or negotiated rulemaking process, whether or not the expert is expected to testify;

(4) the terms of an international agreement or a treaty between the United States and a foreign government or international organization, or the written directions of a foreign government reimbursing the agency for the cost of the procurement of the property or services for such government, have the effect of requiring the use of procedures other than competitive procedures;

(5) subject to subsection (k), a statute expressly authorizes or requires that the procurement be made through another agency or from a specified source, or the agency's need is for a brand-name commercial item for authorized resale;

(6) the disclosure of the agency's needs would compromise the national security unless the agency is permitted to limit the number of sources from which it solicits bids or proposals; or

(7) the head of the agency--

(A) determines that it is necessary in the public interest to use procedures other than competitive procedures in the particular procurement concerned, and
(B) notifies the Congress in writing of such determination not less than 30 days before the award of the contract.

The second new paragraph of the National Defense Authorization Act For Fiscal Year 2001, Pl 106-398, Sec. 2813, "Conveyance Authority Regarding Utility Systems Of Military Departments" states:

(3) With respect to the solicitation process used in connection with the conveyance of a utility system (or part of a utility system) under subsection (a), the Secretary

> concerned shall ensure that the process is conducted in a manner consistent with the laws and regulations of the State in which the utility system is located to the extent necessary to ensure that all interested regulated and unregulated utility companies and other interested entities receive an opportunity to acquire and operate the utility system to be conveyed.

In the Senate Committee Report, which accompanied the proposed legislation, a section entitled "Expansion of procedures for selection of conveyees under authority to convey utility systems" (sec. 2813) states:

> The committee believes that maximizing competition in the privatization of utility systems within the Department of Defense is essential to ensuring that the military receives the most efficient and effective service and to ensuring taxpayers derive the maximum value from the government's previous investment in these systems.

The Senate Report also states:

> …the committee believes that the Department's efforts to bundle systems or installations into a single solicitation for a large region may exclude entities that are only qualified to provide one type of service, or are limited to operating within a specific geographical area. The committee believes the Department should structure its solicitations in a way that allows interested entities to bid on parts of that which is being offered, as well as the entire package, thereby ensuring that all have a fair chance in the competition.

From all of the foregoing, it is clear that Congress favors full and open competition in the sale of the utility systems and procurement of utility services. Only in limited circumstances spelled out in Title 10 USC 2304(c), or at the discretion of the Secretary with 30 day Congressional notification, may a contracting officer proceed with less than a full and open competition.

II. THE PURCHASE OF THE ELECTRIC COMMODITY IN COMPLIANCE WITH 8093.

A. The Provisions of 8093

The purchase of the electric commodity is a separate matter for consideration. The Military Construction Appropriations Act for Fiscal Year 1988, Public Law 100-202, contained section 8093 which states as follows:

> None of the funds appropriated or made available by this or any other Act with respect to any fiscal year may be used by any Department, agency, or instrumentality of the United States to purchase electricity in a manner inconsistent with State law governing the provision of electric utility service, including State utility commission rulings and electric utility franchises or service territories established pursuant to State statute, State regulation, or State-approved territorial agreements:

Congress acted to provide that federal facilities must purchase the electric commodity in accord with State utility franchise laws. The action of Congress is a waiver of sovereign immunity subjecting federal facilities to state law.

This section continues with the following exceptions:

> Provided, That nothing in this section shall preclude the head of a Federal agency from entering into a contract pursuant to 42 U.S.C. 8287; nor shall it preclude the Secretary of a military department from entering into a contract pursuant to 10 U.S.C. 2394 or from purchasing electricity from any provider when the utility or utilities having applicable State-approved franchise or other service authorizations are found by the Secretary to be unwilling or unable to meet unusual standards for service reliability that are necessary for purposes of national defense.".

The first exception, Title 42 United States Code, section 8287 deals with energy saving performance contracts. It is a part of Chapter 91, "National Energy Conservation Policy." It allows heads of Federal agencies to "enter into contracts...solely for the purpose of achieving energy savings and benefits ancillary to that purpose." The contractor is supposed to "incur costs of implementing energy savings measures...in exchange for a share of any energy savings..."

The second exception, Title 10 U.S.C. 2394 is entitled "Contracts for energy or fuel for military installations. It provides that a Secretary of a military department may enter into contracts of up to 30 years for the provision and operation of energy production facilities on real property under the Secretary's jurisdiction or on private property and the purchase of energy produced from such facilities.

B. The Department of Defense Legal Opinion.

Section 8093 has received various interpretations including my own suggestion that the 2394 exception be broadly construed as a general waiver for military facilities.[1]

[1] Rather than limiting the application to the actual language "to purchase electricity", the Eighth Circuit Court of Appeals, in West River Electric Assoc, Inc. v. Black Hills Power And Light, 918 F2d

However, as a DOD agency, the Army must follow the interpretation of the Department of Defense. That interpretation has come from the Department of Defense Office of General Counsel. The opinion was issued on February 4, 2000 by Robert Taylor, Deputy General Counsel, Environment & Installations. A modified version was then adopted by the Acting General Counsel, Douglas Dworkin, and disseminated to the Services on February 24, 2000.

In the first opinion, after a general analysis of federal supremacy, Mr. Taylor confirmed that the use of competitive procedures is mandated by 10 USC 2688 in the privatization of the utility systems. He then presented both a narrow and a broad construction of Section 8093 and whether services or just commodities are governed by state law. He urged a narrow construction of Section 8093, limiting its provision to the purchase of the electric commodity rather than distribution and other services.

The amended version submitted to the Services omits the discussion of the broad construction and simply urges the narrow construction:

> A plain reading of Section 8093's operative statutory language ('to purchase electricity in a manner inconsistent with state law governing the provision of electric utility service…") necessarily leads to the conclusion that the waiver of sovereign immunity in that section is limited to purchase of the electric commodity (electric power) excluding distribution or transmission services. There is nothing in this section to indicate that 'purchase electricity' should be read in any way other than its plain language. Consequently, electricity does not include the provision of utility services other than the commodity. This reading of section 8093 is also buttressed by the rule of statutory construction that waivers of sovereign immunity should be narrowly construed. See,

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713, believed that this language governed the procurement of utility **service** for federal facilities. The court further believed that Federal enclaves were excepted.

> We can only conclude that in enacting section 8093, Congress sought to submit federal installations and other federal agencies to state regulation in the procurement of utility service while refraining from subjecting a federal enclave, a constitutionally-created entity, to such state control."

The Court went on to state that the purpose of the legislation was to protect utility companies from abandonment by federal customers. The Court found it persuasive that there was no abandonment in that case.

The Federal Facilities Council (FFC), a continuing activity of the Board on Infrastructure and the Constructed Environment (BICE) of the National Research Council (NRC) made a distinction based on retail vs. wholesale. It stated in an article on the internet, "However, federal agencies, which are classified as retail, not wholesale, consumers of electricity, are currently barred from buying electricity competitively by section 8093 of the 1988 Defense Appropriations Act."

> e.g., United States Department of Energy v. Ohio, 503 U.S. 607 (1992).

Thus, the final legal opinion from General Counsel of the Department of Defense to the Armed Services states unequivocally that purchase of the electricity commodity alone is governed by State law.

C. Rules Of Statutory Construction And Electric Utility Regulation.

The final conclusion in the Defense legal opinion, that distribution services are beyond the reach of 8093 may be in error because there is another fundamental rule of statutory construction. As summarized in Brown & Williamson Tobacco Corp. V. FDA, 153 F.3d 155, 162(4th Cir. 1998):

> Although the task of statutory construction generally begins with the actual language of the provision in question...the inquiry does not end there. The Supreme Court has often emphasized the crucial role of context as a tool of statutory construction. For example, the Court has stated that when construing a statute, courts must not be guided by a single sentence or member of a sentence, but look to the provisions of the **whole law, and to its object and policy**…
>
> Thus, the traditional rules of statutory construction to be used in ascertaining congressional intent include: **the overall statutory scheme…the history of evolving congressional regulation in the area…and a consideration of other relevant statutes,** (explaining that "all acts in pari materia are to be taken together as if they were one law")

Section 8093 consists of one sentence.:

> to purchase electricity in a manner inconsistent with state law governing the provision of electric utility service including State utility commission rulings and electric utility franchises or service territories established pursuant to State statute, State regulation, or State-approved territorial agreements.

When the entire sentence is read rather than just the portion of the sentence cited by the Taylor opinion as "the operative statutory language", it is clear that Congress intended that the Federal Government abide by the franchised territories established under state law for the provision of the commodity to the end user. Section 8093 is directed to the Government as retail purchaser of the electric commodity. The retail purchase of electricity has historically been inextricably linked to a franchised distributor. Even in the states which have deregulated, and unbundled, the distribution to the final retail customer

is still regulated by franchised territories. [2] Only the source of the power is deregulated and subject to open competition. [3]

D. The Federal Regulatory Scheme

Section 8093 should be read in pari materia with the entire regulatory scheme. Prior to the enactment of 8093 in 1988, there was already a regulatory scheme in place concerning the generation, transmission, and sale of electricity. The Federal Government has regulated the wholesale sale of electricity since 1935. See Transmission Access Policy Study Group, Et Al. V. Federal Energy Regulatory Commission, Vermont Department Of Public Service, Et Al., Intervenors, 225 F.3d 667, (CA D.C. 2000). The Federal Government also regulates the transmission of power in interstate commerce. Pursuant to the provisions of Congress codified at 16 USC 824, the Federal Energy Regulatory Commission (FERC) has regulated wholesale power sales and interstate transmissions, and state agencies have retained jurisdiction over bundled retail sales, including service and the intrastate sale and distribution of electricity. Bundled retail sales are those sales where electricity is generated, transmitted and sold to the end user as an integrated process by one company. Accordingly, the franchised territories established under State laws are retail sales or distribution territories. Whole sale generation and sale has never been governed by state law.

When Sec. 8093 was enacted, the trend towards electric restructuring had just begun. As stated in Transmission Access Policy Study Group, 225 F.3d at 681.

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[2] See for example Pennsylvania. "The commission shall allow customers to choose among electric generation suppliers in a competitive generation market through direct access." 66 Pa.C.S. 2804(2) Generation supplier is defined as: "A person or corporation, including municipal corporations which choose to provide service outside their municipal limits except to the extent provided prior to the effective date of this chapter, brokers and marketers, aggregators or any other entities, that sells to end-use customers electricity or related services utilizing the jurisdictional transmission or distribution facilities of an electric distribution company or that purchases, brokers, arranges or markets electricity or related services for sale to end-use customers utilizing the jurisdictional transmission and distribution facilities of an electric distribution company."

[3] Under Pennsylvania law "It is in the public interest for the transmission and distribution of electricity to continue to be regulated as a natural monopoly subject to the jurisdiction and active supervision of the commission. Electric distribution companies should continue to be the provider of last resort in order to ensure the availability of universal electric service in this Commonwealth unless another provider of last resort is approved by the commission."66 Pa.C.S. 2801(16).

Also, "The commission shall establish rates for jurisdictional transmission and distribution services and shall continue to regulate distribution services for new and existing customers in accordance with this chapter and Chapter 13 (relating to rate making)."

66 Pa.C.S. 2804(10).

> Historically, vertically integrated utilities owned generation, transmission, and distribution facilities. They sold generation, transmission, and distribution services as part of a "bundled" package. Due to technological limitations on the distance over which electricity could be transmitted, each utility served only customers in a limited geographic area. And because of their natural monopoly characteristics, utilities have been heavily regulated at both the federal and state levels.

Technilogical advances paved the way for electric utility restructuring. As explained by the Court in Transmission Access Policy Study Group, 225 F.3d at 681-682:

> Technological improvements also made feasible the transmission of electric power over long distances at high voltages Alternative power suppliers, such as cogenerators, small power producers, and independent power producers emerged in response to these developments. Constructing and operating generation capacity at prices lower than the embedded generation costs of traditional utilities, these alternative suppliers have created a wholesale market for low-cost power. [And]the ability of customers to gain access to the transmission services necessary to reach competing suppliers became increasingly important… Yet the owners of transmission lines, the traditional utilities that had built the high-cost generation capacity, denied alternative producers access to their transmission lines on competitive terms and conditions. FERC therefore began requiring utilities[**10] to file open access transmission tariffs that permitted other suppliers to transmit power over their lines under certain circumstances, such as when a utility sought authorization to merge with another utility or to sell power at market-based rather than cost-based rates.
>
> Then, in 1992, Congress enacted the Energy Policy Act, which amended sections 211 and 212 of the FPA to authorize FERC to order utilities to "wheel" power--i.e., transmit power for wholesale sellers of power over the utilities' transmission lines--on a case-by-case basis… Invoking its authority under sections 205 and 206 of the FPA to remedy unduly discriminatory or preferential rules, regulations, practices, or contracts affecting public utility rates for transmission in interstate commerce, …the Commission issued Orders 888 and 889 to prevent this discrimination by requiring all public utilities owning and/or controlling transmission facilities to offer non-discriminatory open access transmission service…"functional unbundling," i.e., separating utilities' wholesale transmission functions from their wholesale

> electricity merchant functions. Specifically, the orders require utilities to (1) file open access nondiscriminatory tariffs that contain the minimum terms and conditions of nondiscriminatory services prescribed by FERC through its pro forma tariff; (2) take transmission service for their own new wholesale sales and purchases of electric energy under the same terms and conditions as they offer that service to others; (3) develop and maintain a same-time information system that will give potential and existing transmission users the same access to transmission information that the utility enjoys (called the "Open Access Same-Time Information System" or "OASIS"); and (4) state separate rates for wholesale generation, transmission, and ancillary services.

An article by The National Council For Science And The Environment, IB10006: Electricity: The Road Toward Restructuring, is included as Attachment A explaining some more of the history of regulation of electricity.

In 1996, as many states moved to unbundle sales, FERC asserted jurisdiction over all unbundled retail transmissions, leaving the states only the sales portion of unbundled retail transactions. FERC stated that FPA @ 201 gives it jurisdiction without qualification over all transmission by public utilities in interstate commerce, while acknowledging that FPA @ 201(b) explicitly places retail transmissions by 'facilities used in local distribution' beyond the Commission's jurisdiction. FERC then adopted a seven factor test for determining which facilities fall within which category. Transmission Access Policy Study Group, 225 F.3d at 691. The seven factors are listed in Attachment B. Thus for installations in states which have unbundled, the discussion of whether 8093 requires transmission services to be acquired in accord with state law has become moot. FERC has asserted jurisdiction.

A recent FERC order 2000 requires all public utilities that own, operate or control interstate electric transmission to file by October 15, 2000, a proposal for a Regional Transmission Organization (RTO), or, alternatively, a description of any efforts made by the utility to participate in an RTO, the reasons for not participating and any obstacles to participation, and any plans for further work toward participation. The RTOs will be operational by December 15, 2001.

E. Kentucky Electric Utility Regulation

Kentucky, the state in which BGAD is located, has not yet deregulated. The reauthorized Special Task Force on Electricity Restructuring is still holding meetings . In Kentucky retail electric services are governed by the Public Service Commission. Kentucky Revised Statute 278.020(5) states:

> No individual, group, syndicate, general or limited partnership, association, corporation, joint stock company, trust, or other entity (an "acquirer"), whether or not organized under the laws of this state, shall acquire control, either directly or indirectly, of any utility furnishing utility service in this state, without having first obtained the approval of the commission. Any acquisition of control without prior authorization shall be void and of no effect.

City owned utilities are exempt from regulation by the Public Service Commission. "As a result of our re-examination of Chapter 278, KRS, specifically the exemption from the regulatory control of the Public Service Commission granted to cites by the plain language of subsection (3) of KRS 278.010, we have reached the conclusion that our construction of this subsection is erroneous, and we hold that the exemption provided therein extends to all operations of a municipally owned utility whether within or without the territorial boundaries of the city." Carl Mcclellan et al. v. Louisville Water Company et al., 351 S.W.2d 197; 1961 Ky. Lexis 160.

The Kentucky laws that provides for the establishment of certified territories for retail sales of electricity are KRS 278.016-.018. KRS 278.016 states:

> Commonwealth to be divided into geographical service areas. -- It is hereby declared to be in the public interest that, in order to encourage the orderly development of retail electric service, to avoid wasteful duplication of distribution [*880] facilities, to avoid unnecessary encumbering of the landscape of the Commonwealth of Kentucky, to prevent the waste of materials and natural resources, for the public convenience and necessity and to minimize disputes[**9] between retail electric suppliers which may result in inconvenience, diminished efficiency and higher costs in serving the consumer, the state be divided into geographical areas, establishing the areas within which each retail electric supplier is to provide the retail electric service as provided in KRS 278.016 to 278.020 and, except as otherwise provided, no retail electric supplier shall furnish retail electric service in the certified territory of another retail electric supplier.

The formula used for boundaries is set forth at 278.017(1):

> Except as otherwise provided in this section, the boundaries of the certified territory of each retail electric supplier are hereby set as a line or lines substantially equidistant between its existing distribution lines and the nearest existing distribution lines of any other retail

> electric supplier in every direction, with the result that there is hereby certified to each retail electric supplier such area which in its entirety is located substantially in closer proximity to one of its existing distribution lines than to the nearest existing distribution line of any other retail electric supplier.

The third provision addresses the right to serve in a certified territory:

> 278.018. Right to serve certified territory. -- (1) Except as otherwise provided herein, each retail electric supplier shall have the exclusive right to furnish retail electric service to all electric-consuming facilities located within its certified territory, and shall not furnish, make available, render or extend its retail electric service to a consumer for use in electric-consuming facilities located within the certified territory of another retail electric supplier; provided that any retail electric supplier may extend its facilities through the certified territory of another retail electric supplier, if such extension is necessary for such supplier to connect any of its facilities to serve its consumers within its own certified territory. In the event that a new electric-consuming facility should locate in two or more adjacent certified territories, the commission shall determine which retail electric supplier shall serve said facility based on criteria in KRS 278.017(3).

The Court in City Of Florence, Kentucky; And The Union Light, Heat and Power Company v. Owen Electric Cooperative, Inc, wrote:

> The constitutional sections do not grant a municipality the authority to franchise a right to sell electricity within the boundary of a city. The right to produce and sell electricity as a commercial product is not a prerogative of the government, but is a business which is open to all, and for that reason is not a franchise.

.

CONCLUSIONS

Based on the direction from Office of Counsel and the plain language of the two Federal statutes, Public Law 105-85. Sec 2688 and P.L 106-398, Sec. 2813, there must be open competition for the sale of the system unless the facts justify an exemption under 2304. The Installation has offered no information which would lead one to conclude that circumstances warrant an exemption. Additionally it is clear that the commodity must be purchased in accordance with the State's utility laws. In Kentucky, this means a bundled sale from a franchised provider.

Therefore, I believe the contracting officer's position that "we solicit for proposals to privatize the electrical distribution under full and open competition without the commodity" would be the simplest.. However, I am unwilling to conclude that the commodity can not be included in the RFP under any circumstances.. Including the commodity as an optional bid item does not appear to be illegal. As long as the Government does not limit bidders for the system to those who can sell electricity under state law, it has not restricted competition for the system and services. Conversely, if procedures can be established to evaluate and accept bids on the commodity from only those entities eligible to sell the Commodity under state law, there is no violation of 8093

To what extent the RFP must be changed depends upon the answer to the question - what entities can lawfully sell the commodity to the Installation under State franchise laws?
[Further discussion of the RFP omitted for publication]

Geraldine Lowery
Attorney-Advisor
Operations Support Command

Attachment A:

http://www.cnie.org/nle/eng-7.html

October 19, 2000

The Public Utility Holding Company Act of 1935 (PUHCA) and the Federal Power Act (FPA) were enacted to eliminate unfair practices and other abuses by electricity and gas holding companies by requiring federal control and regulation of interstate public utility holding companies. PUHCA remained virtually unchanged for 50 years until enactment of the Public Utility Regulatory Policies Act of 1978 (PURPA, P.L. 95-617). PURPA was, in part, intended to augment electric utility generation with more efficiently produced electricity and to provide equitable rates to electric consumers. Utilities are required to buy all power produced by qualifying facilities (QFs) at avoided cost (the amount it would cost the utility to produce that same amount of electricity; rates are set by state public utility commissions or through a bidding process). QFs are exempt from regulation under PUHCA and the FPA. Electricity regulation was changed again in 1992 with the passage of the Energy Policy Act (EPACT, P.L. 102-486). The intent of Title 7 of EPACT is to increase competition in the electric generating sector by creating new entities, called "exempt wholesale generators" (EWGs) that can generate and sell electricity at wholesale without being regulated as utilities under PUHCA. This title also provides EWGs with a way to assure transmission of their wholesale power to its purchaser. The effect of this Act on the electric supply system is potentially more far-reaching than PURPA.

On April 24, 1996, the Federal Energy Regulatory Commission (FERC) issued two final rules on transmission access (Orders 888 and 889). FERC believed these rules would remedy undue discrimination in transmission services in interstate commerce and provide an orderly and fair transition to competitive bulk power markets. Under Order 888, the Open Access Rule, transmission line owners are required to offer both point-to-point and network transmission services under comparable terms and conditions that they provide for themselves. The Rule provides a single tariff providing minimum conditions for both network and point-to-point services and the non-price terms and conditions for providing these services and ancillary services. This Rule also allows for full recovery of so-called stranded costs with those costs being paid by wholesale customers wishing to leave their current supply arrangements. The rule encourages but does not require creation of Independent System Operators (ISOs) to coordinate intercompany transmission of electricity.

Order 889, the Open Access Same-time Information System (OASIS) rule, establishes standards of conduct to ensure a level playing field. The Rule requires utilities to separate their wholesale power marketing and transmission operation functions, but does not require corporate unbundling or divestiture of assets. Utilities are still allowed to own transmission, distribution and generation facilities but must maintain separate books and records.

Attachment B

The Commission's seven factor test involves evaluating on a case-by-case basis whether the activities of the facilities in question correspond with seven specific indicators of local distribution:

(1) Local distribution facilities are normally in close proximity to retail customers.

(2) Local distribution facilities are primarily radial in character.

(3) Power flows into local distribution systems; it rarely, if ever, flows out.

(4) When power enters a local distribution system, it is not reconsigned or transported on to some other market.

(5) Power entering a local distribution system is consumed in a comparatively restricted geographical area.

(6) Meters are based at the transmission/local distribution interface to measure flows into the local distribution system.

(7) Local distribution systems will be of reduced voltage.

Order 888, P 31,036 at 31,981.

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release January 11, 2001

EXECUTIVE ORDER
- - - - - - -
RESPONSIBILITIES OF FEDERAL AGENCIES TO PROTECT MIGRATORY BIRDS

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in furtherance of the purposes of the migratory bird conventions, the Migratory Bird Treaty Act (16 U.S.C. 703-711), the Bald and Golden Eagle Protection Acts (16 U.S.C. 668-668d), the Fish and Wildlife Coordination Act (16 U.S.C. 661-666c), the Endangered Species Act of 1973 (16 U.S.C. 1531-1544), the National Environmental Policy Act of 1969 (42 U.S.C. 4321-4347), and other pertinent statutes, it is hereby ordered as follows:

Section 1. Policy. Migratory birds are of great ecological and economic value to this country and to other countries. They contribute to biological diversity and bring tremendous enjoyment to millions of Americans who study, watch, feed, or hunt these birds throughout the United States and other countries. The United States has recognized the critical importance of this shared resource by ratifying international, bilateral conventions for the conservation of migratory birds. Such conventions include the Convention for the Protection of Migratory Birds with Great Britain on behalf of Canada 1916, the Convention for the Protection of Migratory Birds and Game Mammals-Mexico 1936, the Convention for the Protection of Birds and Their Environment- Japan 1972, and the Convention for the Conservation of Migratory Birds and Their Environment-Union of Soviet Socialist Republics 1978.

These migratory bird conventions impose substantive obligations on the United States for the conservation of migratory birds and their habitats, and through the Migratory Bird Treaty Act (Act), the United States has implemented these migratory bird conventions with respect to the United States. This Executive Order directs executive departments and agencies to take certain actions to further implement the Act.

Sec. 2. Definitions. For purposes of this order:

(a) "Take" means take as defined in 50 C.F.R. 10.12, and includes both "intentional" and "unintentional" take.

(b) "Intentional take" means take that is the purpose of the activity in question.

(c) "Unintentional take" means take that results from, but is not the purpose of, the activity in question.

(d) "Migratory bird" means any bird listed in 50 C.F.R. 10.13.

(e) "Migratory bird resources" means migratory birds and the habitats upon which they depend.

(f) "Migratory bird convention" means, collectively, the bilateral conventions (with Great Britain/Canada, Mexico, Japan, and Russia) for the conservation of migratory bird resources.

(g) "Federal agency" means an executive department or agency, but does not include independent establishments as defined by 5 U.S.C. 104.

(h) "Action" means a program, activity, project, official policy (such as a rule or regulation), or formal plan directly carried out by a Federal agency. Each Federal agency will further define what the term "action" means with respect to its own authorities and what programs should be included in the agency-specific Memoranda of Understanding required by this order. Actions delegated to or assumed by nonfederal entities, or carried out by nonfederal entities with Federal assistance, are not subject to this order. Such actions, however, continue to be subject to the Migratory Bird Treaty Act.

(i) "Species of concern" refers to those species listed in the periodic report "Migratory Nongame Birds of Management Concern in the United States," priority migratory bird species as documented by established plans (such as Bird Conservation Regions in the North American Bird Conservation Initiative or Partners in Flight physiographic areas), and those species listed in 50 C.F.R. 17.11.

Sec. 3. Federal Agency Responsibilities. (a) Each Federal agency taking actions that have, or are likely to have, a measurable negative effect on migratory bird populations is directed to develop and implement, within 2 years, a Memorandum of Understanding (MOU) with the Fish and Wildlife Service (Service) that shall promote the conservation of migratory bird populations.

(b) In coordination with affected Federal agencies, the Service shall develop a schedule for completion of the MOUs within 180 days of the date of this order. The schedule shall give priority to completing the MOUs with agencies having the most substantive impacts on migratory

birds.

(c) Each MOU shall establish protocols for implementation of the MOU and for reporting accomplishments. These protocols may be incorporated into existing actions; however, the MOU shall recognize that the agency may not be able to implement some elements of the MOU until such time as the agency has successfully included them in each agency's formal planning processes (such as revision of agency land management plans, land use compatibility guidelines, integrated resource manage-ment plans, and fishery management plans), including public participation and NEPA analysis, as appropriate. This order and the MOUs to be developed by the agencies are intended to be implemented when new actions or renewal of contracts, permits, delegations, or other third party agreements are initiated as well as during the initiation of new, or revisions to, land management plans.

(d) Each MOU shall include an elevation process to resolve any dispute between the signatory agencies regarding a particular practice or activity.

(e) Pursuant to its MOU, each agency shall, to the extent permitted by law and subject to the availability of appropria-tions and within Administration budgetary limits, and in harmony with agency missions:

(1) support the conservation intent of the migratory bird conventions by integrating bird conservation principles, measures, and practices into agency activities and by avoiding or minimizing, to the extent practicable, adverse impacts on migratory bird resources when conducting agency actions;

(2) restore and enhance the habitat of migratory birds, as practicable;

(3) prevent or abate the pollution or detrimental alteration of the environment for the benefit of migratory birds, as practicable;

(4) design migratory bird habitat and population conservation principles, measures, and practices, into agency plans and planning processes (natural resource, land management, and environmental quality planning, including, but not limited to, forest and rangeland planning, coastal management planning, watershed planning, etc.) as practicable, and coordinate with other agencies and nonfederal partners in planning efforts;

(5) within established authorities and in conjunction with the adoption, amendment, or revision of agency management plans and

guidance, ensure that agency plans and actions promote programs and recommendations of comprehensive migratory bird planning efforts such as Partners-in-Flight, U.S. National Shorebird Plan, North American Waterfowl Management Plan, North American Colonial Waterbird Plan, and other planning efforts, as well as guidance from other sources, including the Food and Agricultural Organization's International Plan of Action for Reducing Incidental Catch of Seabirds in Longline Fisheries;

(6) ensure that environmental analyses of Federal actions required by the NEPA or other established environmental review processes evaluate the effects of actions and agency plans on migratory birds, with emphasis on species of concern;

(7) provide notice to the Service in advance of conducting an action that is intended to take migratory birds, or annually report to the Service on the number of individuals of each species of migratory birds intentionally taken during the conduct of any agency action, including but not limited to banding or marking, scientific collecting, taxidermy, and depredation control;

(8) minimize the intentional take of species of concern by: (i) delineating standards and procedures for such take; and (ii) developing procedures for the review and evaluation of take actions. With respect to intentional take, the MOU shall be consistent with the appropriate sections of 50 C.F.R. parts 10, 21, and 22;

(9) identify where unintentional take reasonably attributable to agency actions is having, or is likely to have, a measurable negative effect on migratory bird populations, focusing first on species of concern, priority habitats, and key risk factors. With respect to those actions so identified, the agency shall develop and use principles, standards, and practices that will lessen the amount of unintentional take, developing any such conservation efforts in cooperation with the Service. These principles, standards, and practices shall be regularly evaluated and revised to ensure that they are effective in lessening the detrimental effect of agency actions on migratory bird populations. The agency also shall inventory and monitor bird habitat and populations within the agency's capabilities and authorities to the extent feasible to facilitate decisions about the need for, and effectiveness of, conservation efforts;

(10) within the scope of its statutorily-designated authorities, control the import, export, and establishment in the wild of live exotic animals and plants that may be harmful to migratory bird resources;

(11) promote research and information exchange related to the

conservation of migratory bird resources, including coordinated inventorying and monitoring and the collection and assessment of information on environmental contaminants and other physical or biological stressors having potential relevance to migratory bird conservation. Where such information is collected in the course of agency actions or supported through Federal financial assistance, reasonable efforts shall be made to share such information with the Service, the Biological Resources Division of the U.S. Geological Survey, and other appropriate repositories of such data (e.g, the Cornell Laboratory of Ornithology);

(12) provide training and information to appropriate employees on methods and means of avoiding or minimizing the take of migratory birds and conserving and restoring migratory bird habitat;

(13) promote migratory bird conservation in international activities and with other countries and international partners, in consultation with the Department of State, as appropriate or relevant to the agency's authorities;

(14) recognize and promote economic and recreational values of birds, as appropriate; and

(15) develop partnerships with non-Federal entities to further bird conservation.

(f) Notwithstanding the requirement to finalize an MOU within 2 years, each agency is encouraged to immediately begin implementing the conservation measures set forth above in subparagraphs (1) through (15) of this section, as appropriate and practicable.

(g) Each agency shall advise the public of the availability of its MOU through a notice published in the Federal Register.

Sec. 4. Council for the Conservation of Migratory Birds. (a) The Secretary of Interior shall establish an interagency Council for the Conservation of Migratory Birds (Council) to oversee the implementation of this order. The Council's duties shall include the following: (1) sharing the latest resource information to assist in the conservation and management of migratory birds; (2) developing an annual report of accomplishments and recommendations related to this order; (3) fostering partnerships to further the goals of this order; and (4) selecting an annual recipient of a Presidential Migratory Bird Federal Stewardship Award for contributions to the protection of migratory birds.

(b) The Council shall include representation, at the bureau

director/administrator level, from the Departments of the Interior, State, Commerce, Agriculture, Transportation, Energy, Defense, and the Environmental Protection Agency and from such other agencies as appropriate.

Sec. 5. Application and Judicial Review. (a) This order and the MOU to be developed by the agencies do not require changes to current contracts, permits, or other third party agreements.

(b) This order is intended only to improve the internal management of the executive branch and does not create any right or benefit, substantive or procedural, separately enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

WILLIAM J. CLINTON

THE WHITE HOUSE,
January 10, 2001.

# # #

DAIM-ED-R

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Potentially Responsible Party (PRP) Support Services Contracts

1. Two nationwide indefinite delivery type contracts are now available for your use when assessing potential opportunities for the Army to recover funds from a PRP other than another DoD component.

2. The contracts, awarded at the end of June 2000 to HydroGeologic, Inc. and Dynamac, Inc., stand ready for use for 3 years with an option for 2 additional years. The scope of the contracts cover a wide range of activities associated with PRPs, cost recovery and cost sharing including potential contribution to contamination by either tenants on the installation (current or past) or entities located on adjacent properties.

3. Request that this information receives wide dissemination to those directly involved in the Army's Installation Restoration Program, Base Realignment and Closure (BRAC) Environmental Restoration Program, and the Formerly Used Defense Sites (FUDS) Cleanup Program. To access either of these contracts, please contact Mr. Thomas Pfeffer, Technical Liaison and Study Manager, (402) 697-2620, or Ms. Ann Wright, Office of Counsel, (402) 697-2466, U.S. Army Corps of Engineers, Hazardous, Toxic, Radioactive Waste Center of Expertise.

4. My point of contact is LTC Lawrence Powell, DAIM-ED-R, (703) 693-0643.

FOR THE ASSISTANT CHIEF OF STAFF FOR INSTALLATION MANAGEMENT

STACEY K. HIRATA
Colonel, GS
Director, Environmental Programs

DISTRIBUTION:
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SUBJECT: Potentially Responsible Party Support Services Contracts

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US ARMY RESERVE COMMAND, ATTN: AFRC-CS/AFRC-ENV-E, 1401 DESHLER STREET, SW, FT MCPHERSON GA 30330-2000
US ARMY CORPS OF ENGINEERS, ATTN: CECS/CELD-ZE, 20 MASSACHUSETTS AVE, NW, WASHINGTON, DC 20314-1000
US ARMY SPACE AND STRATEGIC DEFENSE COMMAND, ATTN: CSSD-ZC/CSSD-EN, PO BOX 1500, HUNTSVILLE AL 35807-3801
MILITARY TRAFFIC MANAGEMENT COMMAND, ATTN: MTEA-CS/MTEA-FE, 5611 COLUMBIA PIKE, FALLS CHURCH, VA 22041-5050
US ARMY CENTER FOR HEALTH PROMOTION AND PREVENTATIVE MEDICINE, ATTN: MCHB-CS/MCHB-DC-EHM, ABERDEEN PROVING GROUND, MD 21010-5422
US ARMY ENVIRONMENTAL CENTER, ATTN: SFIM-AEC-CO, ABERDEEN PROVING GROUND, MD 21010-5401
US ARMY SIGNAL COMMAND, ATTN: ASCS/ASEN, FT HUACHUCA, AZ 85613-5000
US ARMY TEST AND EVALUTATION COMMAND, ATTN: CSTE-ILE-ENV, 4501 FORD AVENUE, ALEXANDRIA, VA 22302-1458

CHIEF, NATIONAL GUARD BUREAU, ATTN: NGB-ARZ-D/NGB-ARE, ARLINGTON HALL, 111 SOUTH GEORGE MASON DRIVE, ARLINGTON, VA 22204-1382

SUPERINTENDENT, US MILITARY ACADEMY, ATTN: MACS/MAEN, WEST POINT, NY 10996-1592

CF:
DAJA-EL
DASA(ESOH)

COMMANDER, U.S. ARMY CORPS OF ENGINEERS, ATTN: CENWO-OC (MS. ANN WRIGHT), 12565 WEST CENTER ROAD, OMAHA, NE 68144-3869

POLICY FOR TRAVEL FOR THE DEPARTMENT OF THE ARMY
WITH SUPPLEMENTAL GUIDANCE FOR ARMY PERSONNEL
LOCATED IN THE NATIONAL CAPITAL REGION

Department of Defense (DOD) and Department of the Army (DA) transportation resources are to be vigorously managed to prevent both the misuse and the perception of misuse. Travel must be directly and clearly related to mission achievement.

This document supersedes the Secretary of the Army memorandum subject: Policy for Travel by Department of the Army Officials, dated 8 April 1999. It implements specified policies and procedures provided by DOD Directive 4500.56, DOD Policy on the Use of Government Aircraft and Air Travel (1997). It also serves to reduce the cost of travel and prevent the inappropriate and perceived inappropriate use of DA travel resources by the implementation of these policies and procedures.

Those sections shown in bold text are intended for Army personnel located within the National Capital Region (NCR) and may not apply outside of that area.

1. GENERAL POLICY

A. Within the DA, the Secretary of the Army (SA) and the Chief of Staff of the Army (CSA) are required to use military aircraft (MILAIR) for all air travel when in a duty status. In addition, the Commanding General, United States Army Europe and Seventh Army, has been designated a "required user" using MILAIR assets available within the European Theater.

B. This policy memorandum primarily applies to the administrative use of fixed-wing and rotary-wing aircraft by Army officials not discussed in paragraph 1.A. above. Administrative travel, also called "other official travel," generally includes travel to give speeches, attend conferences, meetings, or training courses, make routine site visits, and other similar uses. Justification for the use of fixed-wing MILAIR for administrative travel usually requires a showing that MILAIR is essential vis-a-vis commercial air. Justification for the use of rotary-wing aircraft for administrative travel usually involves a showing that MILAIR is essential vis-a-vis ground transportation, unless commercial air transportation is also available between the general departure and destination locations.

C. All travel requiring HQDA coordination must arrive at HQDA for review NLT 10 working days prior to travel or the request may be returned without action. A letter of explanation will accompany any late submission. Requestors for military air support are encouraged to submit earlier than the 10 working day window to ensure aircraft availability and scheduling.

D. The SA is the approval authority for all official travel out of the National Capital Region by the following Secretariat officials: the Under Secretary; the Assistant Secretaries; the General Counsel; the Administrative Assistant; the Chief of Legislative Liaison; the Chief of Public Affairs; the Director of Information Systems for Command, Control, Communications and Computers; the Inspector General; the Auditor General; the Deputy Under Secretaries; the Director, Small and Disadvantaged Business Utilization; and the Chairman, Army Reserve Forces Policy Committee.

1. Requests for travel for the above officials will be submitted through the Administrative Assistant (AA) who will coordinate travel requests to assure that sufficient key

personnel are in the NCR to conduct Departmental business. Dual absences of the above listed officials and their principal deputies, when authorized, must be approved by the SA.

2. The AA is responsible for developing, for approval by the Secretary, detailed policies and procedures relating to travel of members of the Secretariat and its field operating agencies.

E. The Chief of Staff of the Army is responsible for establishing implementing procedures to properly control official travel within the Army Staff (ARSTAF) and for Army commanders as outlined in this document. Approval authority for the administrative use of MILAIR, fixed and rotary-wing, may not be delegated below the Major Command (MACOM) chief of staff, or equivalent level, for travel by senior officials, in accordance with DOD direction.

F. The Chief, National Guard Bureau (NGB) is responsible for establishing implementing procedures to properly control official travel within the NGB and for State and Territorial Adjutants General.

G. Special emphasis must be given to controlling and monitoring overseas travel (including overseas travel by students of service schools), reducing the number of personnel traveling to the same site, and reducing the number of days of travel per trip.

H. Control of travel will continue to be an item of special interest during all Inspector General and Army Audit Agency inspections, audits, and reviews.

I. U.S. Air Force Air Mobility Command (AMC) or AMC-contracted airlift will be used for overseas travel when it is available and meets the mission requirements for Permanent Change of Station or Temporary Duty travel.

J. Current "Required Use" joint or "dual hatted" Army commanders of Unified & Specified Commands being reassigned to positions within the Department of the Army must document a mission necessity to use MILAIR for permanent change of station travel and must obtain prior authorization from the SA.

K. All military and civilian members of any rank or grade of the Department of the Army are to be considered “officials” of the Department. For purposes of this policy, “Senior Official” is defined as General or Flag officers, and civilian employees of the Senior Executive Service, or equivalent, and higher level employees.

2. OCONUS TRAVEL

A. Travel from the continental United States (CONUS) to locations outside the continental United States (OCONUS), and from OCONUS to CONUS should be undertaken only when the need is absolutely clear, and then only by the smallest groups possible, consistent with mission requirements. Back-to-back trips by different officials to the same location(s) are strongly discouraged. Trips should be actively coordinated to prevent this situation.

B. All OCONUS travel by DA personnel where the traveler will meet with officials of foreign governments must be coordinated with the Office of the Deputy Secretary of Defense (DSD) through the Office of the Secretary of the Army. Travel requests for Secretariat officials will be submitted through the AA to the SA for review and initial approval prior to submission to the DSD. The CSA is delegated authority for initial review and approval of

travel by ARSTAF and MACOM officials and may redelegate this authority. Travel requests reviewed and given initial approval by the CSA or his designee will then be forwarded to the SA through the AA prior to submission to the DSD. All requests for foreign travel should be submitted prior to discussing travel plans with the foreign government concerned.

C. In addition, DA personnel must follow the guidance provided in chapter eight and the country pages of the DOD Foreign Clearance Guide (DoD 4500.54G) to obtain country clearance for all foreign travel. The lead-time for requesting personnel clearances is approximately 35-45 days. Late submissions must include a justification for tardiness.

D. Any Army mission (to include troop visits) involving OCONUS travel, except to U.S. territories and possessions, by the SA, Under Secretary of the Army, Chief of Staff of the Army, or Vice Chief of Staff of the Army must be coordinated with the Under Secretary of Defense for Policy. Within five working days upon completion of such travel, a trip report must be submitted to the Assistant to the President for National Security Affairs through the Executive Secretary.

E. International Conferences. Any DA official travelling to an OCONUS international conference (defined for this purpose as any meeting held under the auspices of an international organization or foreign government, at which representatives of more than two foreign governments are expected to be in attendance, and to which U.S. Executive agencies will send a total of ten or more representatives) must submit a preliminary report of travel to the Department of State's Office of International Conferences in the Bureau of International Organization Affairs (IO/OIC) through the Office of the Secretary of the Army. A final report with respect to this foreign travel must then be submitted to the IO/OIC through the Office of the Secretary of the Army within 30 days after conclusion of travel. (See samples at enclosure 1). DA personnel need not report travel undertaken to carry out an intelligence or intelligence-related activity, a protective function, or a sensitive diplomatic mission.

1. Preliminary and final reports for Secretariat officials will be submitted through the AA to the SA for review and initial approval prior to submission to the IO/OIC.

2. The CSA is delegated authority for initial review and approval of OCONUS international conference travel by ARSTAF and MACOM officials and may redelegate this authority. Preliminary and final reports reviewed and given initial approval by the CSA or his designee will then be forwarded to the SA through the AA prior to submission to the IO/OIC.

3. COMMERCIAL AIR TRAVEL

A. Coach class. The primary mode of transportation used for official air travel will be commercial coach class.

B. Premium-class (less than First-class). There is no longer any blanket authorization to use premium-class (less than first-class) air travel for overseas travel for any DOD officials, military or civilian. All official travelers, regardless of rank or grade, must provide a written justification for each request for the use of premium-class (less than first-class) travel. The normal travel orders approving authority may authorize use of premium-class (less than first-class) commercial travel in accordance with the Joint Travel Regulations (JTR) or Joint Federal Travel Regulations (JFTR) when:

1. Regularly scheduled flights along the route provide only premium-class seats;

2. No space is available in coach, and travel is so urgent it cannot be postponed;

3. Necessary to accommodate a member's disability or other physical impairment substantiated in writing by a competent medical authority;

4. Travel on a foreign flag carrier has been approved and the sanitation or health standards in coach are inadequate;

5. Overall savings to the Government result by avoiding additional subsistence costs, overtime, or lost productive time that would be incurred while waiting for available coach seats;

6. Travel costs are paid by a non-federal source;

7. Obtained through the redemption of frequent traveler benefits (See section 4, Frequent Flyer Miles); or

8. Travel is direct between authorized origin and destination points (one of which is OCONUS), which are separated by several time zones, and the scheduled flight time is in excess of 14 hours (including stopovers between flights). When this authority is exercised, an employee is not authorized a rest period upon arrival at the duty station. The traveler is, however, permitted a short, reasonable time to check into a hotel and freshen up if necessary. This justification shall not be used in lieu of scheduling coach-class accommodations that allow for authorized rest stops en route or at the destination. When returning from TDY, premium-class (less than first-class) travel will not be authorized simply because the total flight time (including stopover) is in excess of 14 hours.

9. Security concerns or exceptional circumstances exist that make such travel essential to the successful performance of the mission (e.g., unavoidably severe scheduling demands)

Example: During the work week, a senior official's schedule requires him to attend official meetings on consecutive days, the later at an OCONUS destination. Due to the inflexible nature of the official's schedule, the official is required to travel overnight and will not receive adequate rest prior to conducting business the following day. Absent adequate rest, the official will be unable to effectively represent the U.S. Army. Accordingly, premium-class (less than first-class) travel may be authorized to allow for the successful performance of the mission.

NOTE: When an airline flight only has two classes of accommodations, the higher class, regardless of the term used for that class, is considered to be first-class.

C. The SA and the CSA, or their designees, are the approving authorities for requests for premium-class (less than first-class) travel for those officials within the Secretariat and ARSTAF, respectively. Requests by members of the Secretariat must be submitted through the AA to the SA for approval. All other requests to use premium-class (less than first-class) travel by senior Army officials will be processed through the individual's normal orders approving chain.

D. First-class. Within the DA, the SA is the sole approval authority for first-class travel paid by government funds or by a non-Federal source pursuant to 31 U.S.C. § 1353. All requests for the use of first-class travel in these instances must be fully justified under the appropriate provision of the JTR/J FTR and submitted through the AA to the SA.

E. The senior traveler must sign all requests for premium-class travel. Signature authority may not be delegated. Each request must reflect the difference in cost between coach class and premium-class and that alternative travel plans—to include an earlier departure to allow for a rest period—have been considered. Approved requests must be maintained for one year for audit purposes.

4. FREQUENT FLYER MILES

A. General. Frequent flyer miles (FFM) earned from official travel are the property of the U.S. Government. Therefore, the first priority for the use of FFM will be to defray the Army's cost for other official travel requirements (e.g., other airline travel, rental cars, lodging, etc.).

1. DA personnel who desire to participate in FFM programs on a voluntary basis may accrue official FFM and related promotional mileage credits for official travel. However, official FFM accounts should be maintained separate from personal FFM accounts. Where government-earned FFM and personal FFM have been commingled into a single FFM account, all FFM within that account will be considered to be property of the U.S. Government absent a clear accounting of FFM to the contrary.

2. DA personnel may use FFM from their personal FFM accounts for premium-class upgrades while on official travel, but no member will travel premium-class while in uniform.

B. Premium-class (less than first-class). FFM earned from official travel may be redeemed for premium-class (less than first-class) travel upgrades in the following circumstances:

1. When the JTR or JFTR authorizes such travel independent of the authority to redeem FFM for an accommodation upgrade.

Example: Official travel is direct between authorized origin and destination points (one of which is OCONUS) which is separated by several time zones, and the scheduled flight time (including stopovers) is in excess of 14 hours. Because there is an independent basis for authorizing premium-class (less than first-class) travel, FFM may be redeemed to obtain the accommodation upgrade.

2. When FFM may only be redeemed for accommodation upgrades.

Example 1: The airline does not permit the redemption of FFM for any other travel requirement. FFM may be redeemed for accommodation upgrades.

Example 2: The airline permits the redemption of FFM for other travel requirements (to include the travel of others). Although the traveler has earned enough FFM to apply towards an accommodation upgrade, the traveler does not have enough FFM to obtain other travel benefits. The traveler may not redeem FFM for an accommodation upgrade in this instance. Instead, FFM must be allowed to accrue until there are enough FFM

to apply towards other official travel requirements.

Example 3: Same circumstances as those presented in example 2, except absent redemption of FFM for an accommodation upgrade in this instance, the FFM will expire and go unused. FFM may be redeemed for an accommodation upgrade.

3. FFM earned from official travel may never be redeemed for use in personal travel, even if FFM will otherwise expire and go unused.

C. First-class. FFM earned from official travel may be redeemed for first-class travel upgrades only when authorized by the JTR or JFTR and approved by the SA.

5. GENERAL MILITARY AIRCRAFT TRAVEL

A. Official air travel is normally accomplished using commercial air transportation. Generally, when commercial air transportation is available to effectively fulfill the mission requirement and meet the traveler's departure and/or arrival requirements within a 24-hour period, military aircraft (MILAIR) shall not be used. Nonetheless, MILAIR may be authorized when:

1. The actual cost of using MILAIR is less than the cost of using commercial air service. Cost analysis for use of MILAIR will be based on the formula approved by the Army Audit Agency; or:

2. Commercial air service is unacceptable because

(a) highly unusual circumstances present a clear and present danger to the official traveler(s), or

(b) an emergency exists, or

(c) other compelling operational considerations make commercial transportation unacceptable; or

3. The aircraft was previously scheduled to perform a bona fide training mission, the minimum mission requirements are not exceeded, and there is no additional cost to the government. MILAIR will not be scheduled for training missions for the primary purpose of accommodating the travel of DA personnel, either military or civilian.

B. When scheduling MILAIR, every effort will be made to avoid:

1. Trips between major U.S. cities. It may be difficult to justify the use of MILAIR for travel along high-density travel routes (e.g., Washington, D.C. to New York City, Atlanta, Los Angeles or Chicago):

a) commercial travel is generally less expensive to major hub cities
b) high density traffic may make it difficult to obtain desired arrival/departure times
c) travelers must be cognizant of the public's perception of the use of military air resources

2. Trips where the aircraft appears to be filled with personal staff members to make the trip cost effective.

3. Trips requested because of the need to accommodate competing requirements, especially when either of the requirements are events of a social nature. Maximum advance planning should be employed to avoid scheduling conflicts dictating the use of MILAIR.

C. The particular aircraft used must be the least costly one capable of satisfying the transportation requirements. Larger aircraft will be used only for reasons of safety, security, or economic feasibility. At no time will a larger aircraft be scheduled in order to accommodate individuals travelling in a "non-interference" or unofficial status.

D. The OCONUS use of CONUS based military aircraft must be approved by the SA for all Secretariat officials, and by the CSA, or when delegated to the VC or DAS, for all members of the Army Staff and MACOM commanders.

E. MACOM commanders are delegated approval authority for the OCONUS use of CONUS based MILAIR for individuals under their supervision. CONUS based MILAIR may only be used for OCONUS travel if the one of the criteria in paragraph 5.A. is satisfied.

F. The use of commercial airlift to OCONUS destinations does not preclude the use of MILAIR in an OCONUS theater of operation when:

1. MILAIR is reasonably available and does not require long deadhead flights to begin or end the mission, or

1. U.S. commercial carriers are not available and significant security concerns preclude the use of foreign flag carriers.

G. All requests for the administrative use of fixed- and rotary-wing MILAIR must be in writing. Requests for travel by other than DOD senior officials are processed for approval through existing standard procedures. Travel approval authorities may establish the specific format for requests and documentation of MILAIR travel. At a minimum, however, this documentation must meet the requirements of DoDD 4500.56.

1. Requesters must determine and document that the requirements of this section and/or section 6 have been met for each individual use.

2. The senior traveler must sign all requests for MILAIR travel. Signature authority may not be delegated.

6. ROTARY-WING MILITARY AIR TRAVEL

A. Rotary wing MILAIR may be used for official travel only when it is cost favorable as compared to ground transportation, or when the use of ground transportation would have a significant adverse impact on the ability of the senior official to effectively accomplish the purpose of the travel.

B. This policy does not apply to "operational mission" use of rotary wing aircraft as defined in AR 95-1, Flight Regulations, or to mission required use such as: transport of troops and/or equipment; training; evacuation (including medical evacuation); intelligence and counter-narcotics activities; search and rescue, transportation of prisoners; use of defense

attaché-controlled aircraft; aeronautical research and space and science applications; exercising command/supervisory authority at adjacent/local installations; and other such activities.

C. If commercial aircraft service is available between the general departure and destination locations, the criteria of paragraph 5.A. must also be satisfied.

D. Helicopter travel to events that can be accomplished by video teleconference, or combined with other events/activities, should not be approved.

E. Helicopter assets shall not be used for transportation between installations within the NCR except in unusual circumstances. The existence of unusual circumstances shall be determined by the SA or his designee for members of the Secretariat, and by the CSA or his designee for Army officials not assigned to the Secretariat.

F. The following guidance applies to the use of the Pentagon Helipad:

1. Eligibility for use of the Pentagon Helipad is restricted to Code 6 civilians, Brigadier Generals, and above.

2. The Pentagon Helipad is normally available Monday through Friday from 0730 to 1730 hours. The CSA or his designee, may grant exception for weekend and/or alternate travel times for Code 2 and 3 civilians and General Officers (four-star). Exceptions may be granted only under the most extraordinary circumstances for travel originating within the NCR.

G. Within the NCR, all approved requests for helicopter support are forwarded from the respective organizational airlift validator to the Operational Support Airlift Command. Normally, the use of this mode of transportation will be limited to those NCR intra-city trips that are within a 125 Nautical Mile (NM) radius and/or more than a 90 minute motor vehicle trip from the Pentagon. A chart providing comparison mileage and time is included for reference at Enclosure 4.

1. Intra-city travel is travel that departs from and arrives at any location within the Greater Washington-Baltimore Metropolitan area.

2. Intra-city travel is limited to Code 1, 2, and 3 civilians and Code 2 and 3 General Officers.

3. Requests for exception must be approved by the AA for Secretariat officials, and by the CSA or his designee for Army officials not assigned to the Secretariat. Requests for exceptions to use of U.S. Army assets by officials other than Army officials will be coordinated with the Executive Secretary of the Department of Defense.

7. SPECIAL AIR MISSION (SAM) AIRCRAFT

A. Special Air Mission (SAM) aircraft are specially configured aircraft assigned to the United States Air Force 89th Airlift Wing used to support only the most important U.S. interest missions and DOD missions where other airlift do not provide the timeliness, security, or communications capability required. The costs associated with operating this limited inventory of aircraft range from approximately $2,300/hour to nearly $4,300/hour depending on the type of aircraft, thereby necessitating judicious use of this limited resource.

All requests for SAM support require a cost analysis as a part of the justification.

B. Within the DA, only the following officials are eligible to use SAM aircraft. If one of these officials is not aboard, the SAM aircraft cannot be used for the mission:

Secretary of the Army
Chief of Staff
Under Secretary of the Army
Vice Chief of Staff
Assistant Secretaries of the Army
General Counsel
Four-star General Officers

C. SAM aircraft may be authorized in the following instances:

1. Travel is plainly in the national interest for official purposes;

2. Commercial transportation is clearly incapable of meeting the requirement for security; or

3. Other significant reasons as approved by the appropriate travel orders approving authority.

D. Approval Process

1. Requirements for both domestic and foreign SAM flights for personnel in the Secretariat will be submitted through the AA to the SA.

2. The CSA will establish procedures for controlling all SAM travel requests for individuals in the Army Staff and MACOM Commanders including foreign counterpart visits.

E. All non-DOD requests for SAM aircraft, exclusive of Congressional travel, will be submitted through the AA for processing to OSD.

F. Congressional use will be coordinated by the Chief of Legislative Liaison in accordance with established procedures. The use of SAM aircraft is especially appropriate for Army sponsored trips by members of Congress or DOD officials when the trip has significant DOD interest.

G. The SAM Airlift validator in the Office of the Chief of Staff, Air Force, provides periodic reports on utilization of SAM aircraft through the AA for review by the SA and the CSA.

8. OPERATIONAL SUPPORT AIRLIFT (OSA)

A. The use of Operational Support Airlift (OSA), both fixed and rotary wing, assigned to DA should be restricted to flights where commercial transportation is inconsistent with security or other significant mission requirements. Requests for use of OSA will be processed in accordance with current directives and procedures.

1. Every effort will be made to pool requirements for maximum aircraft utilization. Minor differences of only a few hours in travel schedules seldom warrant the use

of separate aircraft. (Flexibility in scheduling and passenger loads to accommodate the pooling of missions is encouraged.) All requests should include a comparison of the costs of travel by military air and commercial modes of transportation.

2. The United States Army Priority Air Transport Detachment can support longer missions, but its use must be fully justified through OSA policies and procedures and approved by AA for members of the Secretariat and by the CSA or his designee for members of the Army Staff.

B. The Commander, Operational Support Airlift Command, will provide a semi-annual report of the use of Operational Support Airlift by senior DA officials through the Director of the Army Staff and the AA for review prior to submission to the SA.

C. All MACOM commanders will ensure that they are kept informed of their command's OSA usage.

9. ACCOMPANYING SPOUSE TRAVEL

A. As a general rule, spouses or other family members may not accompany DA personnel, either military or civilian, on official business at government expense. Accompanying spouse travel on either military or commercial aircraft is accomplished as an exception to policy, pursuant to Appendix E, part I, paragraph A13 of the JTR. Exceptions are normally limited to the spouses of senior officials. Other family members or dependents are not permitted to travel at government expense. (See Section 12, Non-interference (reimbursable) travel). (The Joint Travel Regulations can be accessed at http://www.perdiem.osd.mil)

1. Accompanying spouses travelling on commercial aircraft at government expense will fly coach-class, unless otherwise authorized in accordance with section 3, Commercial Air Travel.

2. Accompanying spouses travelling on MILAIR will travel in a noninterference (non-reimbursable) status. MILAIR must be independently authorized in accordance with section 5.

B. Within the DA, accompanying spouse travel eligibility will normally be limited to the spouses of the following officials:

Secretary of the Army
Chief of Staff
Under Secretary of the Army
Vice Chief of Staff
Assistant Secretaries of the Army
General Counsel
General Officers
Sergeant Major of the Army

C. As an exception to policy, spouses may accompany their sponsors on military or commercial aircraft at government expense only:

1. to attend an unquestionably official function in which the spouse is actually to participate in an official capacity, or

NOTE: Actual participation connotes participation beyond mere attendance at a meeting or conference, even if hosted by the DoD on a matter related to official business. The meeting or conference must include a sufficiently substantive spouse agenda requiring the spouses' active participation for a sufficient duration of time to warrant travel at government expense. An example of a substantive agenda is provided at enclosure 2.

2. if such travel is deemed in the national interest because of diplomatic or public relations benefit to the United States.

NOTE: For there to be a diplomatic benefit to the United States, representatives of foreign governments must also be attending the event.

D. Spouses travelling in an accompanying spouse status are not permitted per diem.

E. Approval Authorities.

1. Each occurrence of spouse travel is to be approved on a case-by-case basis. Blanket travel orders for spouses are not permitted. When the requesting official is not assigned to HQDA, the request for approval for spouse travel will also be reviewed by the requesting official's MACOM Chief of Staff, or equivalent, prior to submission. Each request will include the following supporting documentation and will be retained by the requesting organization for two years:

a. Request signed by the sponsor;

b. Name, grade, and position/title of sponsor;

c. Purpose of spouse's travel;

d. Travel date and destination;

e. Type of conveyance, to include cost if commercial flight;

f. Policy and/or fiscal determination by appropriate MACOM official;

g. Agenda or itinerary for spouse that indicates either actual participation or a diplomatic or public relations benefit to the United States.

2. The SA is the approval authority for all accompanying spouse travel of Secretariat officials at government expense on commercial or MILAIR.

a. All requests for spouse travel that are to be approved by the SA will be forwarded to the AA for processing.

b. Requests should be submitted at least 15 working days prior to the travel.

3. Except as delegated in paragraphs 4-6 below, the CSA is delegated the approval authority for all travel of spouses of DA officials not assigned to the Secretariat by

military or commercial aircraft. This authority may be further delegated in writing but may not be delegated below the two-star general officer Chief of Staff for a four-star commanded Major Command, or equivalent level, for travel requests from DOD senior officials within their Command.

4. All four-star general officers and the three-star commander of USARPAC are delegated the authority to approve accompanying travel of their own spouses, and spouses of those in their Command on .
military and commercial air.

a. Each occurrence will be approved individually and documented by a Memorandum for Record that has been reviewed by policy and/or fiscal officials and signed by the principal. Blanket travel orders for the spouses are not permitted.

5. Joint or "dual hatted" DA commanders of Unified & Specified Commands follow their joint command approval process concerning accompanying spouse travel when traveling on behalf of their joint command. When traveling on DA business, the provisions of this policy memorandum will be followed (example: Army Four-Star Commanders Conference).

6. The Chief, National Guard Bureau is delegated, without further delegation, the authority to approve the travel of accompanying spouses of the 54 State and Territory Adjutants General by MILAIR when they are traveling for purposes of National Guard Bureau business. However, when the State and Territory Adjutants General are traveling on state or territory business, the state or territory guidance governing accompanying spouse travel will be used. In either case, the tests of unquestionable official function with actual participation, and/or significant diplomatic or public relations benefits must be met.

F. Spouses traveling at government expense will be in the company of their sponsors. Spouses may only travel unaccompanied when such travel is justified due to unusual circumstances. Under these circumstances, the spouse must travel in the most cost-effective manner, which may include travel on a previously scheduled military or civilian aircraft. Unusual circumstances may include, but are not limited to:

1. unplanned or unanticipated schedule changes or compelling
requirements of the DOD sponsor (e.g. deployment), or

2. the sponsor will be attending the unquestionably official event, and due to other official business requirements, it is more economical for the sponsor to meet the spouse at the destination point and/or depart directly from the destination point for additional official business while the spouse returns home.

10. REQUIRED REPORTING FOR ACCOMPANYING SPOUSE TRAVEL

A. The CSA or his designee will maintain a record of approved accompanying spouse travel (as authorized by section 9 above) on MILAIR and commercial aircraft. This documentation shall be subject to review by the Secretary of the Army, or the AA acting as his designee, when appropriate. The documentation will include spouse travel trips via MILAIR or commercial air for the spouses of all DA officials (not assigned to the

Secretariat), including the following:

1. Commands delegated approval authority for spouse travel by the Chief of Staff of the Army;

2. Four-Star General Officers and the Three-Star Commander of USARPAC;

3. Joint or "Dual Hatted" commanders when travel was on behalf of the DA; and

4. State and Territory Adjutants General of the National Guard when travel was on National Guard Bureau business.

B. Documentation of individual spouse travel trips will include:

1. Name of sponsor and spouse,

2. Justification (i.e., participation in an official capacity at an unquestionably official function, or diplomatic or public relations benefit),

3. Destination,

4. Duration, and

5. Any per diem or incidental expenses allowed to the spouse.

C. Documentation of each trip approved by the CSA or his designee will be maintained for at least two years from the date of travel to comply with audit and/or inspection requirements.

11. OTHER SPOUSE TRAVEL

A. Travel by spouses is usually accomplished in an accompanying status as provided in section 9 above. However, spouses may also travel <u>independent</u> of their sponsors when travel is authorized in accordance with the JTR/JFTR (other than Appendix E, Part I, paragraph A13 of the JTR). When travelling pursuant to an independent basis, spouses are authorized per diem. For example, travel and per diem for spouses is authorized when:

1. the spouse will attend a service-endorsed training course or briefing and provide subsequent volunteer service incident to such training, (e.g., Pre-Command Course, Brigadier General Training Course, anti-terrorist training course) as specified by HQDA.

a). *Course Approval Procedures.* Certain courses, such as the Pre-Command Course, have already been considered and approved as service-endorsed. For other Courses, the JTR requires approval through "the Secretarial Process." Consequently, requests should process through command channels and the Deputy Chief of Staff for Operations (DCSOPS) Training Division to the Office of the Administrative Assistant to the Secretary of the Army for staffing within the Secretariat and approval. Requests should include, as a minimum, a detailed program of instruction and a memorandum explaining the primary and direct mission-related benefit that the Army will receive as a result of funding this training for family members.

b. *Travel Approval.* Once a course is approved, selected spouses may attend the training at government expense and receive the same travel allowances as a service member or employee who is on temporary duty (TDY). The normal order-issuing official for ITOs approves the travel on a case-by-case basis, ensuring that there is a primary and direct mission-related benefit to the Army by that particular family member attending the training.

2. the spouse will confer with DOD officials on DOD matters as a subject matter expert. In this instance, being a spouse is incidental to being a subject matter expert, and the circumstances of travel are not to be confused with accompanying spouse travel. Under this authority, the spouse may be issued invitational travel orders through normal procedures without obtaining special approval for spouse travel. It is generally DA policy that spouses travelling to participate in discussions on Army Family Programs and/or Quality of Life issues shall travel in an accompanying spouse status (per diem not authorized) in accordance with section 9, unless travel is for an excepted program in accordance with B. below.

B. Notwithstanding the restriction in paragraph 10.A.2 above, when the spouse or other qualified individual has been selected to serve as a member of the delegation to an official conference concerning Army Family Programs or Quality of Life issues, then the activity that is sponsoring the conference may authorize the sending command to issue an ITO (per diem authorized) for that spouse's travel if the following conditions apply:

1. The activity that is sponsoring the conference is commanded by an official in the rank of major general or above;
2. The conference has a substantive agenda aimed at affording the Army Secretariat or Army leaders guidance, advice, and testimony that is essential to the process of developing effective policies pertaining to family, education, health care, retention, and other issues related to the well-being of our soldiers and their families;
3. The conference's established objective is to render a discernable substantive product, such as a set of policies, a strategic plan, or an action plan;
4. The agenda requires full-time participation by each delegate to ensure that it completes its agenda and accomplishes its established objective;
5. The process for selecting delegates conforms to Army regulatory guidance and the slate of delegates has been approved, in writing, by the sponsoring commander.

In no case, however, will the spouse of a soldier or DA employee be entitled to separate reimbursement for the lodging portion of per diem if the soldier or employee is on TDY to the same conference, is concurrently on TDY in the same commuting area of the conference, or resides within commuting distance to the conference site.

C. Commanders of Major Commands will submit an annual report through the Director of the Army Staff to the Administrative Assistant to the Secretary of the Army no later than 15 October summarizing Army Family Program conference participation and delegate travel,

along with a summary of cost to the Army for that travel.

12. UNOFFICIAL TRAVEL — NON-INTERFERENCE (REIMBURSABLE) TRAVEL

A. Non-interference (reimbursable) travel is travel by a spouse, dependent, or other non-Federal traveler not on official business in the company of a senior DOD official (normally Code 1, 2 and 3 civilians, and Code 2 and 3 General Officers) traveling on official business on MILAIR. This is not space available travel.

B. Non-interference travel is only authorized if the following conditions are met:

1. MILAIR is already scheduled for an official purpose;

2. The non-interference use does not require a larger aircraft than is needed for the official purpose;

3. Official travelers are not displaced;

4. The travel results in negligible additional cost to the government; and

5. The government is reimbursed at the full commercial coach- class fare rate or equivalent. The full coach-class fare is defined as any coach fare that is available to the general public between the day that the travel was planned and the day the travel occurred, including restricted fares, provided the traveler would otherwise be able to satisfy the restrictions associated with the particular fare if travelling via commercial air.

C. This travel will be approved in advance in writing. Each request will be reviewed by the senior traveler's legal counsel prior to submission for approval. The senior DOD official will attach to his/her travel voucher a personal check made payable to the Treasurer of the United States and include a travel office printout that reflects the full commercial fare

D. Approval will be through the senior traveler's normal approval chain.

13. MOTOR VEHICLE TRANSPORTATION

A. AR 58-1 governs the use of motor vehicle transportation to include the procurement and use of sport utility vehicles. This section highlights guidance found in that regulation pertaining to non-tactical vehicles and provides additional guidance where necessary.

B. Section 1344 of Title 31 of the United States Code specifies those officials who are authorized home-to-work transportation. Within the DA, only the SA and the CSA are authorized home-to-work transportation.

1. With certain limited exceptions prescribed by statute, home-to-work transportation is not transportation for an official purpose, and is prohibited. Normally, such transportation is a personal responsibility. Section 1344 establishes criteria for exceptions to this policy, and for reporting those exceptions to Congress. However, within the DA only the SA can approve those exceptions.

2. Individuals who are authorized home-to-work transportation may incur personal tax liability in connection with this government-furnished service regardless of the circumstances. The law provides that an individual who willfully violates Section 1344 may be suspended without pay for a minimum of 30 days, and when circumstances warrant, for a longer period, or may be summarily removed from office. Military personnel who willfully use or authorize
the use of government vehicles for other than official purposes, can be disciplined under provisions of the UCMJ or other administrative procedures as appropriate.

C. Transportation to official after-hours functions will be treated as exception to policy for which prior approval is required. All transportation to after-hours functions will begin and end at the individual's normal place of duty.

D. Official motor vehicle transportation requirements do not include: transportation to private social functions; personal errands or side trips for unofficial purposes ; transportation of dependents or visitors without an accompanying official; or in support of non-DOD activities unless specifically approved under the provisions of Army Regulation(s).

E. The use of Army motor vehicles is restricted to official purposes only.

1. Military and civilian personnel of the DA may use DA motor vehicles when attending official ceremonies (e.g., changes of command, parades, promotions, retirements, unit activations/deactivations, field demonstrations, funerals, or other similar events) when attendance is in their official capacity. For purposes of these functions, the most senior military and civilian DA official designated to represent the DA organization concerned, as well as those DA officials who are actively participating, are attending in their official capacity. Mere attendance at an event does not justify the use of government vehicles except in those rare occasions where the event achieves a significant public affairs objective to justify the official use of group transportation (e.g., buses).

Example 1: It would be appropriate for a corps commander who is presiding over a subordinate division change of command ceremony to use a DA motor vehicle for transportation to the ceremony.

Example 2: It would be appropriate for a National Guard division commander who is attending a subordinate battalion change of command as an invited guest and senior representative in the chain of command to use a DA motor vehicle for transportation to the ceremony

2. Army motor vehicle transportation is not authorized for officials attending such ceremonies or events only in a personal capacity. All DA officials attending simply as invited guests (other than the senior DA official in attendance) are deemed to be travelling in their personal capacity. This includes attendance based solely on friendship, family ties, or prior professional relationship with the honoree.

Example 1: Normally, it would be inappropriate for a general officer to use a DA motor vehicle to attend or preside over a promotion ceremony for a former subordinate who is no longer in the general officer's chain of command

Example 2: It would be inappropriate for the former commander of a unit to use a DA motor vehicle to travel to that unit's change of command as an invited guest.

3. Commanders or their principal staff officers will determine whether attendance at such ceremonies or events is in an official or personal capacity. When official travel is authorized for general attendance the mode of travel provided will normally be via mass transportation rather than via individual vehicles.

F. Spouses of DA officials may be authorized transportation in government vehicles only when:

1. Accompanying their DA sponsor, the use of the vehicle has already been authorized to accomplish official business, and there is space available. Such transportation must be provided at no additional cost to the government, and the spouse's presence may not require a larger vehicle than that already authorized to accomplish official business;

2. Proceeding independently to or from an official function when the spouse's presence at the function is in the best interest of the government and circumstances have made it impractical or impossible for the official to accompany the spouse en route; however, this authority applies only to the spouse of a DA employee who is authorized to receive home-to-work transportation.

G. Transportation support to other U. S. Government agencies, or non-U.S. Government entities, may be provided only under strict guidelines. Reimbursement by the requesting activity is normally required for transportation support to non-DOD activities. DA officials shall review established guidelines and obtain required approvals prior to inviting travel or committing Army support.

H. Sport utility vehicles (SUVs) are a relatively new class of vehicle with four-wheel drive and an off-road capability that make the vehicle ideal for police, range support, and other off-road duties that require physical abilities exceeding those of a sedan or truck. SUVs are also necessary to more safely handle certain types of road conditions in inclement weather. However, SUVs cost more to buy or lease. As a class, the SUVs have a poor miles per gallon rating, and the vehicles currently are not designed to use an alternative fuel. In addition, SUVs are generally considered a status symbol.

1. SUV's will not be acquired by purchase or lease to enhance the comfort or prestige of any individual, regardless of grade or rank.

2. Army activities are required to use the smallest, most fuel efficient vehicle capable of meeting agency needs. Specifically, where a Class II sedan or light duty pickup truck will meet mission requirements, a larger and more prestigious SUV will not be acquired, leased, or used.

3. Commanders of MACOMs are responsible for approving SUV requests by installations and activities for high-end SUVs or any SUV that has a maximum gross vehicle weight that is greater than or equal to 5,000 pounds. MACOMs and commanders should seek to limit the use of such high-end and costly SUVs. Criteria are found in the Federal Vehicle Standards 20XX at: http:pub. fss.gsa.gov/pub/vehicle-standards.html.

a. Exceptions to the MACOM approval requirement include

(1) SUVs that are available as alternative fueled vehicles.

(2) SUVs that are used directly and specifically for police, fire, rescue, criminal, investigative, and intelligence activities.

(3) Recruiting and military entrance processing activities in areas where snow, sleet, and freezing rain would terminate the mission for lengthy periods.

b. Except for special requirements such as inclement weather conditions and off-road use, SUVs will not be used exclusively as passenger-carrying vehicles when a sedan, van, carryall, bus, taxi, privately owned vehicle (reimbursable), or public transportation would meet mission requirements.

14. ACCEPTANCE OF PAYMENT FROM A NON-FEDERAL SOURCE FOR OFFICIAL TRAVEL EXPENSES

A. Title 31 U.S.C. § 1353 is the primary authority for the acceptance of gifts of travel and related expenses. When that statute applies, it shall be used to the exclusion of other authorities. The definition of terms and policies under this statute is at 41 C.F.R. § 304.

B. Heads of component commands or organizations may delegate approval authority, in writing, to accept travel payments from a non-Federal source to a division chief under their supervision serving in the grade of colonel or the civilian equivalent. Prior to authorizing acceptance of an outside payment of official travel and related expenses, travel-approving authorities must consult with their own, or the traveler's, ethics counselor and obtain a written determination from that ethics counselor that acceptance is appropriate.

C. In addition to the criteria at 41 C.F.R. § 304, payment from a non-federal source for official travel expenses may be accepted when the following conditions are met:

1. The offer of travel expenses must be unsolicited and completely voluntary.

2. The gift may only be used for official travel.

3. The gift may only be used for conferences or similar functions. An offer of travel expenses to perform functions essential to an Army mission (such as inspections or oversight visits) or to attend sales presentations will not be accepted.

4. The gift of travel may not create a conflict of interest. The approval authority must determine that acceptance would not cause a reasonable person in possession of the relevant facts to question the integrity of Army programs or operations.

D. An offer of free travel for an accompanying spouse will be processed and approved in accordance with section 9 of this memorandum. Such requests will be evaluated on the basis of whether it is in the Army's interests to accept the offer.

E. The SA retains the authority to approve all first-class travel. Requests for first-class air travel, including those paid by a non-Federal source, must be fully justified under the applicable provisions of the JTR/JFTR. This requirement applies to the traveling official *and* accompanying spouse.

. F. The following reporting requirements apply to the acceptance of travel payments from a non-Federal source.

1. In order to simplify the travel voucher process, travelers are encouraged to accept "in-kind" travel expenses (that is, prepaid tickets and hotels), rather than cash

reimbursement. If reimbursement is in the form of a check, it will be made out to "Department of the Army" and deposited with the servicing travel office.

2. Travelers must report to their ethics counselors the acceptance of travel and related expenses exceeding $250.00. The report must contain the traveler's certification that "the statements in this report are true, complete, and correct to the best of my knowledge and belief." The report must be submitted to the ethics counselor for review and signature within thirty days of completion of the travel. A suggested format for this report appears at enclosure 3.

3. Ethics counselors will use Standard Form 326, Semiannual Report of Payments Accepted From a Non-Federal Source, to consolidate reports from travelers in their jurisdiction. Standard Form 326 will be electronically submitted to the Office of the Judge Advocate General (OTJAG), Standards of Conduct Branch at soco@hqda.army.mil. Reports for gifts received during the period 1 April to 30 September must be received at OTJAG by 15 November. Reports of gifts received between 1 October and 31 March are due by 15 May. Ethics counselors will maintain the reports submitted by travelers for one year after submission. Standard Form 326 is available on the General Services Administration website at www.gsa.gov/forms.

Encl. 1

FOREIGN TRAVEL DATA SHEET

(SUBMIT TO THE OFFICE OF INTERNATIONAL CONFERENCES, DEPARTMENT OF STATE, ROOM 1517,
FAX 202-647-1301 OR 202-647-5996; Phone 202-647-5875)

PRELIMINARY REPORT
(to be completed before foreign travel to an international conference)

NAME OF TRAVELER (last, first):
EMPLOYING DEPARTMENT OR AGENCY:
TITLE HOST OF INTERNATIONAL CONFERENCE ATTENDED:

WILL MORE THAN TWO FOREIGN GOVERNMENTS ATTEND? YES NO
NAME OF OFFICIAL AUTHORIZING TRAVEL:

PURPOSE OF TRAVEL:**(Select code: (1) member of delegation; (2) technical/administrative support to delegation (3) meetings with foreign officials outside the conference; (4) other (specify)**

DATE TRAVEL BEGINS: DATE TRAVEL ENDS:

CONTACT TELEPHONE NUMBER

FINAL REPORT
(to be completed within 30 days of the conclusion of travel)

NAME OF TRAVELER (last, first)

CONFERENCE ATTENDED/HOST:

DATE TRAVEL BEGAN: END DATE OF TRAVEL:

ACTUAL COST OF TRAVEL:

Complete the following only if there have been changes since the preliminary report:

EMPLOYING DEPARTMENT OR AGENCY:

NAME OF OFFICIAL WHO AUTHORIZED TRAVEL:

PURPOSE OF TRAVEL:

Encl. 2

SAMPLE OF SPOUSE AGENDA

YOUR LETTERHEAD

SUBJECT:	Itinerary for Visit of Mrs. John Doe, Spouse of LTG John D. Doe, Commander, U.S. Army Pacific
IN PARTY:	TBD
PURPOSE:	Orientation Visit

Monday, 8 February 1999

0900	Arrive New Toyko International Airport; met by Protocol
0900-1030	Airport procedures
1030-1100	En route Distinguished Visitors Quarters (DVQ); Activities as desired
1100-1130	Orientation Briefing
1130-1230	Lunch hosted by Mrs. Smith with roundtable discussion on quality of life issues having highest community interest (Cathy Rogers, Spouse, CS; Robin White, Spouse, DC; Dods Brown, Spouse , of Commander, 17TH ASG; Barbara Carter, Spouse, Commander, USARPAC)
1230-1240	En route Army Community Se rvices (ACS)
1240-1315	ACS Brief/open discussions with ACS staff -regarding program needs and unique concerns, and tour of facility
1315-1320	En route Community Activities Center (CAC)
1320-1400	Sensing session with New Parent Support Program Group to include active duty and spouse participants
1400-1405	En route Child Development Center (CDC)
1405-1445	Visit CDC/discussions with care givers, CDC staff regarding needs and services provided
1445-1450	En route Youth Activities
1450-1530	Visit Youth Center/discussions with Youth Activities Staff on Youth Programs
1530-1540	En route Library
1540-1615	Visit Library/check current available resources and response times on ordered materials
1615-1630	En route DVQ
1630-1750	Activities as desired and prepare for reception
1750-1800	Walk to Community Club
1800-TBD	Reception and Dinner

Tuesday, 9 February 1999

0755-0800	En route Quarters 1000
0800-0900	Breakfast hosted by Mrs. Smith
0900-0905	En route Elementary School
0905-1000	Visit Elementary School/discussions with the Principal on standards for DODDS and where the school falls in the large overall picture compared to the Elementary Schools in the U.S.1000-1005 En route Community Support Facilities
1005-1115	Tour and discussions with personnel of the Community Support Facilities
1115-1120	En route Community Club
1120-1300	AFTB/Family Support Meeting/Working Luncheon and

discussions on quality of life issues with a cross-section of Battalion spouses with opening and closing remarks by Mrs. Smith

Encl. 3

REPORT OF PAYMENT OF TRAVEL & RELATED EXPENSES
ACCEPTED FROM NON-FEDERAL SOURCES
(31 U.S.C. 1353)

Employee's Name:
Command Organization:
Employee's Position:
Spouse's Name (If applicable):

EVENT
(for which more than $250 in travel and related expenses were donated)

Nature /Title of Event:

Sponsor:

Location:

Dates: From: To:

TYPE OF DONATION

Donating Organization:

Total Amount:

Amount of Payments In-Kind: For Employee: For Spouse:

(pre-paid conference fees, hotel costs, airline tickets, pre-paid meals, etc.)

Amount of Payments by Check For Employee: _____ For Spouse:.

(Check must be made to "Department of the Army". Submit to your travel office.)

Itemized Expense:
Hotel:
Airline:
Meals:
Other

'I certify that the statements on this report are true, complete, and correct to the best of my knowledge."

Signature of Traveler Date of Signature

SUBMIT REPORT TO YOUR ETHICS COUNSELOR WITHIN 30 DAYS

Ethics Counselor Printed Name and Signature Date of Signature

(paid by non-Federal source)

Encl. 4

Comparison Chart
Estimated Times and Distances

Location	Ground	Ground Times		Air	
	Statute Miles	Non-Rush (Hours)	Rush (Hours)	Nautical Miles	Time (Hours
Aberdeen Proving Ground	75	1.50	3.00	55	.80
Andrews AFB	15	0.25	0.83	9	.40
Antietam National Battleground	80	2.00	3.00	36	.40
Baltimore City/vicinity	45	1.00	1.50	30	.40
Carlisle Barracks	115	3.00	4.00	80	1.00
Charlottesville	120	3.00	4.00	78	1.10
ChancellorsviIle National Battlefield	60	1.33	2.20	45	.65
Fredricksburg National Battlefield	60	1.33	2.20	40	.60
Ft AP Hill	70	2.00	3.00	4 9	.65
Ft Detrick	55	1.0O	2.00	36	.50
Ft Lee	125	3.00	400	97	1.20
Ft Meade	30	.75	1.25	20	.40
Gettysburg National Battlefield	85	2.00	3 00	55	.80
Patuxent Naval Air Station	78	2.00	2 50	46	.65
Quantico Marine Base	35	1.00	1 50	24	.40
Xerox Training Center	35	1.00	1.50	26	.40

Telemarketing Scams

Shopping by telephone, especially during the holidays, can be very convenient, and there are many legitimate companies that do business through telemarketing. However, most people would be surprised to know that there are an estimated 14,000 illegal telemarketing operations bilking U.S. citizens of at least $40 billion annually. Unfortunately, the telephone is used by crooks every day to commit armed robbery against consumers. These people rob with phones instead of guns, and they don't care about the pain they cause when, for example, they steal an elderly person's life savings. All consumers, and seniors in particular, need to understand that these aren't just aggressive or "sleazy" salespeople trying to make a living -- fraudulent telemarketers are hardened criminals willing to take their victims' life savings. They're so good at what they do, they can even persuade people to mortgage their homes in order to claim their sweepstakes winnings or make investments. But all too often there aren't really any sweepstakes, investments or other great deals, merely the loss to the victim and a disconnected phone number and fake address on which to base any pursuit of the criminals.

Studies by various agencies show that most fraud victims don't make the connection between illegal telemarketing and criminal activity. They simply don't associate the voice on the phone with someone who could be trying to steal their money. Most believe that the caller is a nice young man or woman simply trying to make a living, such as a student working his or her way through college, or an ambitious person trying to set a good sales record at the company. Or, in the spirit of the holiday season, choose to believe in people rather than distrust them. Later, they may realize that they haven't gotten their money's worth, but they are reluctant to admit that they have been cheated or robbed by telemarketers.

Once they understand that illegal telemarketing is a serious crime -- punishable by heavy fines and long prison sentences – people are more likely to hang up and report calls to the authorities.

It's sometimes hard to tell if a sales pitch is legitimate or fraudulent. You can't judge it by the tone of someone's voice, or how friendly or sincere the person seems.

Good salespeople are convincing, and so are crooks.

Here are some typical telemarketing scams, and the reality behind them:

Scam: You get a call or postcard from someone telling you you've won a prize and asking for payment to buy something, for processing or administrative fees, for customs, for taxes, or any other reason.

Fact: Legitimate sweepstakes or prize offers don't ask for payment because it's illegal.

Scam: The person says you have to take the offer immediately or you'll miss the opportunity.

Fact: Legitimate companies don't pressure people to act without time to look into the deal.

Scam: The caller refuses to send you written information before you commit to anything.

Fact: Legitimate companies are always glad to send information about what they're offering.

Scam: The caller claims that you can make huge profits in an investment with no risk.

Fact: All investments are risky and legitimate companies must tell consumers about the possible risks involved.

Scam: The caller claims that you can make huge profits through a franchise or other business opportunity with little or no effort.

Fact: All business ventures require knowledge and effort on the part of buyers, and no legitimate companies would guaranty profits.

Scam: The caller is asking for a donation but won't tell you exactly how the money will be used and how you can verify the charity and what it does.

Fact: Legitimate charities are willing to say what percentage of contributions is used for services and how much goes to overhead and fundraising. They are also willing to tell consumers with whom they can check to confirm that the caller is legitimate.

Scam: The caller insists that you send your payment by a private courier or wire money.

Fact: Legitimate companies don't try to keep people from checking the deal out and changing their minds, or try to evade the postal authorities, by demanding immediate payment by courier or wire.

Scam: The company representative asks for cash.

Fact: Legitimate companies don't ask for cash, but con artists do because they often have trouble getting merchant approval from the credit card companies, and they also want to be hard to trace.

Scam: The caller asks for your social security number.

Fact: Legitimate companies don't ask for that unless you are applying for credit and they need to check your credit report.

Scam: The caller asks for your credit card number, bank account number, or other financial information when you aren't buying anything or paying with those accounts.

Fact: Legitimate companies only ask for financial information to bill you or debit your account for purchases you've agreed to make.

Scam: The company calls you relentlessly or after you've asked not to be called anymore.

Fact: Legitimate companies will take "no" for an answer and will take you off their calling lists if you ask. Con artists will keep on calling to wear you down or get more money from you.

Scam: The company representative offers to get you a loan, or credit, or a credit card, or to "repair" your bad credit if you pay an up-front fee.

Fact: Legitimate lenders and credit card issuers do not demand payment in advance, and no one can get bad information removed from a credit file if it is accurate.

Scam: The company representative offers to get back money that you have lost to another fraudulent scheme if you pay an up-front fee.

Fact: Law enforcement agencies don't ask for payment to try to help consumers get their money back, and it's illegal for a company to ask for advance payment for such services.

Remember, giving money to a fraudulent telemarketer usually means losing it forever. Don't let a criminal break into your home through your telephone line!

You can call the Legal Assistance Office at 532-4371 if you are concerned about a telemarketing call, or the National Consumer Hotline at 1-800-876-7060, or your local law enforcement authority.

The Point of Contact for this subject is Ms. Pamela McArthur, DSN 992-4371, commercial (732) 532-4371.

Solicitations in the Federal Workplace

Because of recent questions from within HQAMC and inquiries from ethics officials in the MSCs, I thought it appropriate to reissue this Ethics Advisory that was first issued in August 1998. The rules have not changed since then, but the reissuance provides a good reminder concerning "Solicitations in the Federal Workplace."

The general rule is that employees may not solicit the sale of magazine subscriptions, cosmetics, household products, hair replacement systems, vitamins, candy, cookies, insurance, weight loss programs, etc. while on the job or in their offices. Even if off the job and outside the workplace, they may not knowingly solicit DoD employees who are junior to them. A specific provision of the *Joint Ethics Regulation* says that "[a] DoD employee may not knowingly solicit or make solicited sales to DoD personnel who are junior in rank, grade or position, or to the family members of such personnel, on or off duty." JER 2-205. In addition, employees may not solicit money to give gifts to nice people or good causes. There are some limited exceptions, but this is the starting point: **no solicitation in the Federal workplace!**

Does this mean that you may not discuss cars, mechanics, home maintenance problems, and the like with your colleagues and tell them what products, services or service providers you particularly like? Of course not! We do this all the time with our friends and colleagues. We pass on personal experiences as to what we think was helpful and what was not; how we were scammed; or where we found a particularly helpful product or service provider. The problem begins if we bring our business cards, brochures, or advertisements or other offers to sell good or services to fellow-employees. It is worse problem if the employee is soliciting or trying to raise money for a good cause from subordinates.

It would be permissible for a co-worker to approach you and ask that, if you are still selling collectible sports cards in your part-time business, he or she would like to buy the latest Topps Gallery Baseball set from you; and the next day you bring in this set and complete the transaction at your car at the end of the work day. But, it would ***not*** be permissible for you to keep a few boxes of various Topps sets in your desk and let it be known that you are selling them. A fine distinction? Perhaps... but, it is an important distinction. The latter case represents improper solicitation.

If a co-worker has a toothache but no dentist, it would be permissible for you to provide the name, address and phone number of your dentist with whom you are very satisfied. However, it would not be permissible to pass out your dentist's card (with your name on the back) to all your co-workers so that you can obtain a $25 credit for every referral.

It would be permissible for you and a co-worker to decide to sign up for a tour together with a travel agency. However, it would not be permissible for you to "pitch" the trip to each of your co-workers so that you could get 50% off your tour price for signing up four other travelers.

It would be permissible for you to do a favor at the request of a co-worker by obtaining a particular shade of cosmetic from your neighbor who sells the particular brand, order and buy it for your friend, and deliver it to your friend and accept reimbursement. But, it would not be permissible for you to bring in to the office various samples, color charts, and order forms; and then take orders, accept payments and make deliveries at the office to help your neighbor expand his or her business.

There can be a fine line between what is and is not permissible. Hopefully, the examples will help you evaluate the situations that you might be faced with.

Yes, there are some exceptions to the rule of **no solicitation in the Federal workplace**, but they are limited. Employees may solicit in the Federal workplace in the following circumstances:

- For a fellow-employee for a special, infrequent occasion such as wedding, birth or adoption of a child, transfer out of the supervisory chain, and retirement. A promotion is not considered a "special, infrequent occasion." [Yes, I know, promotions are "special," and they certainly are "infrequent;" but the fact of the matter is that they are not "special, infrequent occasions" for purposes of the ethics rules unless the promotion is accompanied by a transfer outside of the supervisory chain.] We can solicit no more than $10 from other employees, and contributions must be entirely voluntary. The value of the gifts may not exceed $300.

- For food and refreshments to be shared in the office. Again, participation must be voluntary.

- For the Combined Federal Campaign and Army Emergency Relief. Again, whether to contribute and how much must be entirely voluntary.

- To raise money among ourselves for our own benefit when approved by the commander or head of the organization (e.g., selling shirts and hats to subsidize the AMC organization day picnic).

If it doesn't fit one of the above situations, don't solicit. Not only will you be in compliance with the ethics rules, but your colleagues will appreciate it. In more cases that you might realize, your co-workers are just too nice to tell you that they do not want to be subjected to solicitations in the workplace. They often feel compelled to buy something to maintain "peace," especially if they work for you. Workplace solicitation can create a lot of resentment and bad feelings.

Even if the solicitation fits one of the exceptions, be careful. Voluntariness is the "key." It should not be a senior employee who does the solicitation. Don't make repeated entreaties. Don't require the employee who declines to explain him or herself. Always make a provision for an employee to "opt out" of the gift contribution that is included in the price of the luncheon.

If you aren't sure or think that a particular situation might or should fit an exception, discuss it with your Ethics Counselor before you engage in the solicitation.

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